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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-15

THE CREEK NATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, the Creek Nation of Indians of the State of Oklahoma, respectfully petitions the Court to grant a writ of certiorari to the United States Court of Claims to review its Order of April 4, 1978, affirming on appeal the opinion and findings of the Indian Claims Commission on the value of the lands involved, entered on February 17, 1977 (39 Ind. Cl. Comm. 383-434), and its final award thereon entered on April 6, 1977 (40 Ind. Cl. Comm. 90).

OPINIONS BELOW

The final order of the Court of Claims, dated April 4, 1978 is not as yet reported (___ Ct. Cl. ___), and is printed as Appendix C to this petition. The opinion, findings, and interlocutory order of the Indian Claims Commission on valuation entered on February 17, 1977 (39 Ind. Cl. Comm. 373-434); and the final award entered by the Indian Claims Commission entered thereon on April 6, 1977 (40 Ind. Cl. Comm. 90), are printed as Appendices D and E to this petition. The opinion, findings, and interlocutory order of the Indian Claims Commission determining liability under Section 2, Clause 5 of the Indian Claims Commission Act (24 Ind. Cl. Comm. 238-269 (1970)), are printed as Appendix F to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of the Indian Claims Commission Act of August 13, 1946, c. 959, Pub. Law 79-726, §20(c), 60 Stat. 1049, 1055-1056 (25 U.S.C. 70s(c)), as supplemented and amended by Act of September 8, 1960, Pub. Law 86-722, 74 Stat. 821, 829 (25 U.S.C. 70s(c)); the Act of October 8, 1976, Pub. Law 94-465, 90 Stat. 1990, entending the life of the Indian Claims Commission Act until September 30, 1978, and transferring all remaining unsettled claims to the United States Court of Claims for final disposition; and also under 28 U.S.C. §1255. Said Section 20(c) of the Indian Claims Commission Act is printed as Appendix G to this petition.

The Indian Claims Commission Act was amended and extended to April 10, 1972 by Acts of July 24, 1956, c.

679, Pub. Law 70-767, 70 Stat. 624, and June 16, 1961, Pub. Law 87-48, 75 Stat. 92, by Act of April 10, 1967, Pub. Law 90-9, §1, 81 Stat. 11; and to April 10, 1977 by Act of March 30, 1972, Pub. Law 92-265, §1, 86 Stat. 114; and finally by Act of October 8, 1976, Pub. Law 94-465, 90 Stat. 1990, the life of said Indian Claims Commission Act was extended to September 30, 1978, and provided that all unsettled claims thereafter be transferred to the United States Court of Claims for final disposition under the provisions of Section 2 of said Indian Claims Commission Act. Said Act of October 8, 1976 is printed as Appendix H to this petition.

AUTHORITIES INVOLVED

The Original Creek Agreement between the United States and the Creek Nation, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861, which incorporated by reference therein Section 21 of the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, and Section 2 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 138, the pertinent parts of which are printed as Appendix I to this petition.

Also Sections 2 and 20(b), (c), of the Indian Claims Commission Act (25 U.S.C., 70a and 70s(b), (c)), the pertinent parts of which are printed as Appendix G to this petition.

QUESTIONS PRESENTED

1. In its review of this fair and honorable dealings case did the Court of Claims fulfill its appellate function under the directive of Congress set forth in Section 20(b) of the Indian Claims Commission Act, when it failed to review specifically the issues raised by appellant, that the

Indian Claims Commission made findings contrary to the record, made inconsistent findings, and failed to make findings of substantial evidence that would reflect the entire record; when said Order of April 4, 1978 merely concluded generally that it "has considered the record, the briefs, and the oral argument, and now rejects appellant's appeal and affirms the Commission", without analyzing the issues thus raised on appeal. (Appendix C, p. 23a).

2. Did the Court of Claims on the appeal in this case err in failing to direct the Indian Claims Commission to apply to this fair and honorable dealings case, in which a special fiduciary relationship existed between the United States and the Creek Nation, the same measure of damages the Court of Claims authorized the Commission to apply in the similar *Seminole Nation v. United States*, 203 Ct. Cls. 637 (1974), and particularly footnote 11, at page 654, wherein the Court of Claims held that the claimant, in a fair and honorable dealings case, is not bound by strict "legal rights", and that the Commission could award as a part of damages due claimant the value of the lands and also the income therefrom, even though said income developed after the date the lands were lost through the breach of trust by the United States, the guardian; and especially when the Commission exercised its discretion in the *Seminole* case by directing in its Order of March 17, 1976 (37 Ind. Cl. Comm. 499), that the income lost the claimant "beyond fair market value" be included as a part of damages "necessary to provide '. . . an appropriate and equitable measure of redress under clause 5' ", citing the *Seminole* case.

3. Did the Court of Claims err in holding that the decision in *Makah Tribe v. United States*, 40 Ind. Cl. Comm. 131 (1977), is not applicable to this Creek case,

said *Makah* case being a similar fair and honorable dealings case, in which a "special fiduciary relationship" existed between the United States and the Indian claimant under an agreement; and wherein the United States, the guardian, breached the trust agreement, and the Commission held that the Makahs were entitled to recover as damages the value of the rights lost as the result of the breach of trust, and also the income therefrom.

4. Did the Court of Claims err in failing to hold that in this fair and honorable dealings case, in which a "special fiduciary relationship" existed between the United States and the Creek Nation, wherein the United States, as guardian, breached the trust agreement and created the losses complained of herein to the dependent Indian ward, in refusing to hold that the ward should recover, under established precedents, the value of the lands thus lost to the ward, and also the income in the form of royalties from oil and gas extracted therefrom, similar to the damages that a court of equity would award under the equitable doctrine of tracing.

5. Did the Court of Claims err in failing to hold that the Indian Claims Commission abused its discretion in deciding the issue of the value of the Creek lands involved herein, and in refusing to include as a part of damages the income that the Indian ward would have received from said lands, except for the breach of the trust agreement committed by the United States, the guardian.

STATEMENT OF THE CASE

In this case the Indian Claims Commission determined in its trial on liability, under Section 2, Clause 5 of the Indian Claims Commission Act (25 U.S.C. 70a(5)), author-

izing the adjudication of "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity", that the United States is liable to the Creek Nation for the losses sustained by it as a result of (1) the Government's breach of the fiduciary duties it assumed in administering the provisions of the Creek Agreement of March 1, 1901, 31 Stat. 861; and (2) its enrollment of third persons, not entitled to such enrollment on the final rolls of the Creek Nation, thus erroneously allotting to each of said persons a total of 160 acres of Creek tribal lands. The issue of liability has thus been established. (24 Ind. Cl. Comm. 238 (1970); Appendix F. pp. 79a-111a).

Thereafter, at the valuation trial to determine the amount of recovery due the Creek Nation, the parties agreed (1) that the United States had erroneously enrolled 142 persons on the Creek tribal rolls, and allotted to each of them approximately 160 acres of Creek tribal lands, totaling 22,737.21 acres; and (2) that the Government breached the "special fiduciary relationship" on March 4, 1907, when the Creek tribal rolls became final, and the errors thereon could not thereafter be corrected.

On February 17, 1977, 39 Ind. Cl. Comm. 383-434 (1977); (Appendix D, p. 27a), the Commission determined that the 142 erroneous allotments, totaling 22,737.21 acres, had a fair market value on March 4, 1907, of $430,324.65, or $18.92 an acre. for agricultural, grazing and townsite purposes; and that the known and potential oil and gas deposits under these lands increased the fair market value thereof by the amount of $550,000.00.*

* The findings and determination of the value of the coal deposits underlying these Creek lands, in the amount of $110,000.00, determined by the Commission; and the amount of Creek tribal funds erroneously paid to the erroneous enrollees, some $25,381.55, were accepted by the Creek Nation, and not appealed from. The total judgment entered, including all items valued was $1,115,706.20. *Creek Nation v. United States,* 40 Ind. Cl. Comm. 90 (1977); Appendix E.

Petitioner appealed from the above determinations of value to the United States Court of Claims. The United States did not cross appeal. Petitioner on appeal raised the issue that the findings of the Commission were so incomplete that they did not include substantial evidence on value based on and reflective of the record as a whole; that the Commission made findings contrary to the record; and that such errors constituted reversible error, sufficient to return the case to the Commission for further proceeding. *Miami Tribe of Oklahoma v. United States,* 146 Ct. Cls. 421, 447, 465, 469 (1959); *Snake or Piute Indians v. United States,* 125 Ct. Cls. 241, 255, 286-287 (1953); *Seminole Nation v. United States,* 316 U.S. 286, 300 (1942). In its order of April 4, 1978 (Appendix C, p. 22a), the Court of Claims failed to analyze the issues thus raised on petitioner's appeal, which we submit it had a duty to do under Section 20(b), of the Indian Claims Commission Act (25 U.S.C. 70s(b)); (Appendix G, p. 112a).

The record discloses the nature of the 142 Creek tracts involved herein. They were valuable for agricultural development, and also for the mineral deposits underlying them (39 Ind. Cl. Comm. 383, 390, 401-408, 410-414, 421-429; Appendix D, pp. 27a-74a).

Had the Indian Claims Commission followed the long established precedents of many prior Indian land valuation cases, and recognized as substantial evidence the valuable data contained in the Soil Surveys of the U. S. Department of Agriculture of the Counties of Oklahoma, cover-

ing the 142 Creek tracts in question, the Commission's ultimate conclusion of the surface value of said tracts would have been over three times the value so determined, as set forth above.

Had the Indian Claims Commission, in determining the value of the oil and gas interests in the 142 Creek tracts, followed the precedent established in *Seminole Nation v. United States,* 203 Ct. Cls. 637, 654, n. 11 (1974), as supplemented by the Order of the Indian Claims Commission therein of March 17, 1978 (37 Ind. Cl. Comm. 499, 500; Appendix J, p. 121a), the valuation due the Creek Nation would also have included recovery as a part of the damages resulting from the Government's breach of the "special fiduciary relationship", the income in the form of royalties of one-eighth of the oil and gas actually produced from 63 producing tracts, amounting to $6,284,578.61 (Appendix M, p. 133a).

Petitioner submits that the failure of the Court of Claims to analyze the issues raised on appeal, and to remand this case to the Indian Claims Commission with directions that it follow the established precedents in the above respects, is error, and forms the basis upon which this court, in the interest of equal treatment under the law, should now provide the remedy.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Generally the Order of the Court of Claims of April 4, 1978, appealed from, conflicts with other precedents it has established in similar Indian claims cases, and has thus sanctioned a departure of established principles by the Indian Claims Commission in valuing Indian lands. Furthermore, the important question of the measure of damages to be

awarded by said Commission to the Indian ward in fair and honorable dealings cases, in which there existed a "special fiduciary relationship" between the United States, as guardian, and the defendant Indian ward, under an agreement, wherein the guardian breached said trust agreement, has never been decided by this Court.

We review these matters briefly below.

Under Question 1

The Court of Claims failed to review the issues raised by petitioner that the Indian Claims Commission made findings contrary to the record, made inconsistent findings, and failed to make findings on material issues of substantial evidence that would reflect the record as a whole, as the Court has done in many cases, including *Snake or Piute Indians v. United States,* 125 Ct. Cl. 241 (1953); *Miami Tribe of Oklahoma v. United States,* 146 Ct. Cl. 421 (1959).

Where a Court or a Commission makes findings contrary to the record, makes inconsistent findings, and fails to make findings of substantial evidence on material issues of fact that would reflect the substantial evidence in the record as a whole, the appeals court, as in the above cited cases, would reverse the case and remand it to the lower tribunal to correct these errors. See also *Seminole Nation v. United States,* 316 U.S. 286, 300 (1942). The Court herein has failed to follow its own well established precedents governing review in Indian claims cases, under Section 20(b) of the Indian Claims Commission Act. (Appendix G, pp. 112a-113a).

Under Question 2

The Court of Claims herein failed to apply to this case its decision in the similar case of *Seminole Nation v. United States,* 203 Ct. Cl. 637 (1974), and particularly footnote 11, at page 654, in which the United States, the guardian, gave away to third parties Seminole tribal lands without providing compensation therefor. This *Seminole* Case involved a breach of the "special fiduciary relationship", and was also a fair and honorable dealings case, based upon Section 2, Clause 5 of the Indian Claims Commission Act, which provides that the Commission is authorized to adjudicate "(5) claims based upon fair and honorable dealings that are not recognized by any existing rules of law or equity." Footnote 11, of the above decision provided:

> "The defendant is very wide of the mark when it urges that appellant has no standing under the fair and honorable dealings clause (clause 5) to point to railroad activities after March 1, 1909, because the abandoned station reservations became vested as a matter of law, under the 1906 Act, in the adjoining owners or the municipalities on that date. Clause 5 is not limited to legal rights, and the Nation can show that the destruction of its legal rights, as of March 1, 1909, even if constitutional, caused it injury which should now be redressed in fair measure under that provision of the Claims Commission Act. If the railroad's gains after March 1909 are taken into account, it will not be because appellant is 'legally' entitled to such sums but because those gains are considered an appropriate and equitable measure of redress under clause 5."

As the Court in its Order of April 4, 1978 herein pointed out, the Court gave the Commission discretion to award the proper measure of damages. In its opinion, at page 654, it stated:

> "* * * We leave to the Commission on remand to determine the appropriate compensation – whether it should be fair value as of the date of vesting in the towns and cities, the rents and profits derived from the lands, a combination of both standards, or some other measure."

Thereafter, in its order of March 17, 1976 (37 Ind. Cl. Comm. 499), the Commission exercised its discretion in favor of the submission of evidence that would reflect an award of damages which would include the value of the lands lost by the Indian ward, and in addition thereto the income lost to the Indian ward, in the following language:

> "3. The determination of the quantum of damages, if any, beyond fair market value of the plaintiff's interest in the station reservation lands as of June 30, 1909, necessary to provide '. . . an appropriate and equitable measure of redress under clause 5' (*see Seminole Nation v. United States,* 203 Ct. Cl. 637, 654 N. 11 (1974)), shall be made by the Commission as part of its decisions in the valuation phase of this docket."

We submit that the above action of the Commission has established a precedent for the present proceedings. Its action indicates that income lost by the Indian ward from a breach of trust by the United States, the guardian, even though it developed after the date the lands were

lost through the breach of trust, should be included as a part of the damages to be awarded the Indian ward.

Had these lands not been lost to the Indian ward, it could have leased them for oil and gas development in 1907 for large cash bonuses, and recovered income therefrom in the form of royalties of one-eighth of the oil and gas produced from said lands involved herein. (Appendix M, p. 133a).

As this Court stated in *United States v. Creek Nation,* 295 U.S. 103 (1935), at page 110:

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. * * *"

It is, accordingly, submitted that the precedent thus established in the *Seminole* case, should have been applied in the present Creek proceedings.

Under Question 3

We submit that the decision in *Makah Tribe v. United States,* 40 Ind. Cl. Comm. 131 (1977), should have been applied to the present proceeding. The *Makah* case was a fair and honorable dealings case, in which a "special fiduciary relationship" existed between the United States, as guardian, and the Makah tribe, the Indian ward. The United States breached the trust agreement (treaty), and the income lost to the Indian ward was directed by the Commission to be included as a part of damages due it.

Petitioner contends that the principle established as precedent in the *Makah* case, is equally applicable to the present proceedings.

The Court's order of April 4, 1978, appealed from herein, states in part (Appendix C, p. 24a):

> "* * * This is a land case and thus far the uniform practice has been in all 'takings' of land (again, in the non-eminent domain sense) under the 'fair and honorable dealings' clause, to use the fair value of the 'taken' land as of the date of 'taking' ".

The cases referred to by the Court were those in which the United States acquired lands from an Indian tribe, in the absence of some specific language in a treaty, agreement or statute spelling out a "special fiduciary relationship", and in which the Court seems to have meant merely that the relationship between the Indians and the Government is "similar to" or "resembles" such a relationship. *Gila River Pima-Maricopa Indians, et al. v. United States,* 135 Ct. Cl. 180, 189 (1956). However, we distinguish the decisions in those cases from the present proceedings, in which the United States took over full control, custody and management of the property and affairs of the Creek Nation under an express agreement, and breached this "special fiduciary relationship" by giving away to third persons Creek tribal lands in violation of the trust agreement. (24 Ind. Cl. Comm. 238, 246-251 (1970); Appendix F, pp. 88a-93a). The difference between the two sets of cases is obvious.

Under Question 4

In a fair and honorable dealings case, based solely upon moral grounds, and not bound by existing rules of law or equity, should the measure of damages be at least what a court of equity would decree under the equitable doctrine of tracing? In such a case the guardian has breached the trust agreement and has created the resulting loss to the ward. Under the doctrine of tracing, the ward can follow the trust property and recover it, or its value, together with the income derived from the lands or other property after the time of the breach of trust. Bogert, on Trusts and Trustees (2nd Ed.), Sec. 921, at pages 300-302.

In the present proceedings, each one of the 142 separate erroneous allotments of Creek tribal lands has been examined and traced. Where there has been actual oil and gas production from a tract, the resultant royalties have been determined, insofar as production records are now available. (Appendix M, p. 133a). A total of 75 of these tracts produced oil or gas, but the production records of only 63 of the tracts could now be found, and the early production records of some of the producing tracts could not be found. (Appendix M, p. 133a). The Commission found that of the 142 tracts involved in this case, ten had oil and gas leases on them by the year 1907; thirty-one more were leased between 1908 and 1910; and sixty-one others were leased by the year 1915. (39 Ind. Cl. Comm. 383, 429; Appendix D, pp. 70a-71a).

We believe that the damages to be awarded in this case should include not only the value of the lands thus lost, but also the income thus lost to the Indian ward in the form of royalties on oil and gas extracted from said tracts, to make the Indian ward whole as of today for the loss of these lands in 1907, as provided in the Commission's

Order of March 17, 1976, paragraph 3, in the *Seminole* case, *supra*, (Appendix J, p. 121a). When thus lost through the breach of trust by the guardian, oil and gas underlaid the producing tracts, and the value of the lands and the income therefrom in the form of royalties on the oil and gas produced would represent the full damages due the Indian ward resulting from the breach of the trust agreement by the guardian, the United States.

Under Question 5

The Court of Claims erred in failing to find and hold that the Indian Claims Commission had abused its discretion in this case in the following respects:

a. In failing to apply herein the same alternative measure of damages, the Commission adopted in its Order of March 17, 1976 (39 Ind. Cl. Comm. 499; Appendix J, par. 3, p. 121a), which the Court of Claims authorized it to do as an alternative measure of damages in *Seminole Nation v. United States*, 203 Ct. Cls. 637 (1974), and in its footnote 11, at page 654. In the *Seminole* case and this *Creek* case, the Commission and Court of Claims agree that there were unfair and dishonorable dealings involving the Government's breach of the "special fiduciary relationship" existing between the parties. Herein, the Government, as guardian, in executing the trust agreement gave away Creek tribal lands to third parties not entitled thereto. In determining the measure of damages to be awarded in the similar *Seminole* case, the Commission's Order of March 17, 1976, *supra*, adopted a combination of the fair market value for the lands as of the date lost, as well as the income therefrom lost to the Indian ward since that date. Thus, unless this case is remanded for equal treatment, unequal justice will result from this abuse of discretion.

b. In departing in this case from the long established precedent of the Commission of using as substantial evidence the valuable and relevant data contained in the soil surveys of the U. S. Department of Agriculture in determining the value of lands in Indian Claims cases. *Miami Tribe of Oklahoma, et al. v. United States,* 6 Ind. Cl. Comm. 513, 544, 546 (1938); *Miami Tribe of Oklahoma, et al. v. United States,* 9 Ind. Cl. Comm. 108, 125-126 (1961); *Lummi Tribe v. United States,* 10 Ind. Cl. Comm. 286, 302-303 (1962); *Northern Paiute Nation, et al. v. United States,* 16 Ind. Cl. Comm. 215, 223-230, 244, 247, 297, 300, 309 (1965); *Creek Nation v. United States,* 16 Ind. Cl. Comm. 431, 472 (1965); *Ponca Tribe of Oklahoma, et al. v. United States,* 20 Ind. Cl. Comm. 272, 275, 282 (1969). Herein the Commission refused to consider the valuable data relative to the Creek lands in question contained in the Soil Surveys of the U. S. Department of Agriculture of the Counties in Oklahoma created out of the Creek lands in question. Petitioner knows of no valid reason for the Commission's departure in this case from this long established precedent. In the cases cited above the same differences existed between the date of value and the date of the soil surveys. As the Commission stated with respect to the Soil Survey in the above cited case of *Northern Paiute Nation, et al. v. United States,* 16 Ind. Cl. Comm. 215 (1965), at page 309:

> "* * * After studying all the evidence we are convinced that the 1950 United States Soil Conservation Service report provides the best evidence for establishing a basis for a highest and best use land classification. However, we do believe that there was a limited deterioration in the land quality between the 1853 valuation date and the 1950 report. * * *".

c. In the Commission's disregard of the valuation of the surface of these Creek lands by the petitioner's appraiser, which was based upon the data relative to soils, climate, temperature, economics, etc., contained in the U. S. Department of Agriculture Soil Surveys of the relevant Counties in Oklahoma covering these lands (39 Ind. Cl. Comm. 383, 414; Appendix D, pp. 34a, 56a; Appendix K, pp. 125a-128a). This data, in the absence of private land sales on the open market, provides the best evidence of the attributes which go to make up the value of the lands in question. This method of valuation has been approved by the Commission and Court of Claims in many Indian claims cases. *Alcea Band of Tillamooks, et al. v. United States,* 115 Ct. Cl. 463, 493 (1950), reversed with respect to interest awarded, 341 U.S. 48 (1951); *Rogue River Tribe, et al. v. United States,* 116 Ct. Cl. 454, 478 (1950); *Otoe and Missouria Tribe of Indians v. United States,* 131 Ct. Cl. 593, 632-634 (1955); *Osage Nation v. United States,* 3 Ind. Cl. Comm. 217 (1954); *Ponca Tribe of Oklahoma, et al. v. United States,* 20 Ind. Cl. Comm. 272, 276-277 (1969).

d. In disregarding and failing to find the value of the surface of said lands involved, in accordance with values set forth in the Soil Survey of Muskogee County, Oklahoma, made by the U. S. Department of Agriculture, and issued August 4, 1915, on field operations of the Bureau of Soils in 1913, which in the absence of open market private lands sales, showed the surface values of said lands to be (Appendix L, p. 129a):

> "The value of farm lands ranges from $8 to $20 an acre for the sandy mountain soils,

from $40 to $100 for prairie land, and from $100 to $125 or more for the first and second bottom lands."

These surface values were shown by unrefuted evidence, to exist throughout the Creek Nation. The use of these average values for 21,777.21 of the 22,737.21 acres involved, and their application to the classification of the lands made by the Commission (39 Ind. Cl. Comm. 383, 417; Appendix D, p. 58a), results in a surface value of $1,310,548.04. This valuation is over three times the nominal value of the surface of these Creek lands as determined by the Commission, of $430,324.65, or $18.92 an acre. (Appendix D, p. 58a).

e. In disregarding the sole evidence in the record showing that the 960 acres of said lands, which the Commission determined were valuable for townsite purposes, had a value for said purposes of $1,186,000 (Appendix M, p. 130a); whereas, the Commission arbitrarily determined their value for this purpose to be the nominal amount of $48,000.00. (39 Ind. Cl. Comm. 383,417; Appendix D, p. 58a).

f. In concluding, contrary to the record, that the lands involved herein, located in Eastern Oklahoma, were "badly affected by the terrible 'Dust Bowl' of the 1930's" (39 Ind. Cl. Comm. 383, 390; Appendix D, p. 34a); whereas, these lands were many miles east of the Dust Bowl, the eastern limit of which was the 100° of west longitude (the beginning of the panhandle of Oklahoma). "The Yearbook of Agriculture, 1937", U. S. Department of Agriculture, pp. 41-42, states:

"The Critical Area

"The Great Plains comprise an area stretching from west central Texas to the border of Canada. On the west the Rocky Mountains are the border. On the east the region is irregularly delimited near the one-hundredth meridian, where formerly the short-grass country merged into the tall-grass or prairie country. In the critical area are the Texas Panhandle, the Oklahoma Panhandle, northeastern New Mexico, and all the northern portion of the Plains. Annual rainfall is low throughout the entire region. There are short, intense storms, wide fluctuations of temperature, and strong prevailing winds. Frost and snow make wind erosion a less serious danger in the north than in the south; but soil blowing and soil depletion occur throughout the region, particularly in the areas of excessive plowing."

g. In finding and holding, contrary to the record and inconsistent with its own findings, that these Creek lands "would not have been allotted had it been known that there were minerals beneath the surface. It was, in theory, the policy of the Department of the Interior to hold mineral lands for the benefit of all members of the tribe." (39 Ind. Cl. Comm. 383, 385, 411; Appendix D, pp. 29a, 53a); whereas, the Commission inconsistently found that "Federal officials and Indians alike believed that there was oil in Oklahoma. The Muskogee *Weekly Phoenix*, of November 2, 1899, had stated that there were great deposits of oil in Indian Territory. There were producing wells at Muskogee, Chelsea, and Bartlettsville, and vast potential

oil fields stretched across the Cherokee and Creek Nations." (39 Ind. Cl. Comm. 383, 421; Appendix D, p.62a).

h. In using as a basis for its valuation of the surface of said lands first sales of Creek Indian lands to whites through the respondent's office at Muskogee, Oklahoma, that were not open market sales, and were made at the time when respondent's administrative officers of the United States were dealing in the very lands they were then administering under the trust agreement (24 Ind. Cl. Comm. 238, 260-266; Appendix F, pp. 101a-108a). These sales were made upon low appraisals of the lands, and for extremely low prices, and did not reflect known oil or other mineral values. (39 Ind. Cl. Comm. 383, 406, 410-411, 415-416; Appendix D, pp. 52a-53a, 56a-58a).

i. In failing to find that in 1907 experienced oil operators were paying cash bonuses of $1,500 an acre for oil and gas leases in the famous Glenn Oil Field discovered in the Creek Nation in 1904-1905, in addition to a one-eighth royalty on all oil and gas produced from said lands (Appendix M, p. 130a); that three of the tracts involved herein were located in the middle of said field; and that had the petitioner been able to have leased said tracts, which contained 474.25 acres in the famous Glenn Oil Field in 1907, these three tracts alone would have netted the Creek Indian ward $1,453,794.43 in cash bonuses and royalties (Appendix M, p. 134a), well beyond the valuation for oil and gas determined by the Commission for all of the 142 tracts, of $550,000. (39 Ind. Cl. Comm. 383, 431; Appendix D, p. 73a).

j. In failing to find from the substantial evidence in the record that the 18 tracts involved herein, which the Commission found were located in the Cushing Oil Field (39 Ind. Cl. Comm. 383, 428; Appendix D, p. 70a), had

an estimated value as follows: The Barney Thlocco tract of 160 acres, $2,000,000; and the other 17 tracts in this field, $1,000,000 each. (Appendix M, pp. 131a-132a).

k. In failing to find from the substantial evidence in the record that the royalty of one-eight of the oil and gas produced from the 63 producing tracts, lost to the Creek Nation as the result of the Government's violation of its "special fiduciary relationship" to the Creek Nation, totaled $6,284,578.61 (Appendix M, p. 133a).

CONCLUSION

For the many reasons set forth herein, this petition for a writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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Of Counsel:
T. HAROLD SCOTT

FILED
JUL 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-15

THE CREEK NATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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APPENDIX A

BEFORE THE

Indian Claims Commission

No. 163

THE CREEK NATION, *Plaintiff*,

v.

THE UNITED STATES, *Defendant*.

PETITION.

[Filed July 24, 1951]

To the Honorable Commissioners of the Indian Claims Commission:

The plaintiff, the Creek Nation, respectfully represents:

I.

That by a certain Act of Congress, approved August 13, 1946 (60 Stat. 1049; 25 U. S. C. 70), the plaintiff was authorized and empowered to present this claim for final determination. That this claim is not included in any suit pending in the Court of Claims, or in the Supreme Court of the United States, nor was it pending in the Court of Claims under any legislation in effect on the date of the approval of said Indian Claims Commission Act.

II.

That plaintiff is known as the Creek Nation of Indians, and has always been recognized as such in

treaties and agreements between it and the United States; that it has a duly elected Principal Chief holding a Commission as such from the President of the United States, and a Creek Indian Council, which are representative of said Creek Nation, and are so recognized by the officers of defendant charged with the responsibility of administering Indian affairs.

III.

That at the time of the passage of what is known as the Curtis Act, approved June 28, 1898 (30 Stat. 495), and for many years prior thereto, the Creek Nation was the owner in fee of a large tract of land situated in what is now the State of Oklahoma, and of large sums of money held in trust for it by the United States, and of large sums of money due from the United States under various treaties with plaintiff.

IV.

That before the passage of said Curtiss Act the said Creek Nation maintained a tribal organization subject only to the laws and Constitution of the United States, and had an established form of government, an executive or Principal Chief, a legislature or National Council, a system of courts, and a constitution or code of written laws whereby the affairs of said Nation and of its citizens were administered.

V.

That said lands and said funds were held as a communal estate, by said Creek Nation, for the benefit of its individual members, the membership of said tribe

and the consequent right to participate in the benefits arising from said lands and said funds, being governed by the laws of said Nation, said citizenship being evidenced by certain documents kept by the duly constituted authorities of said nation and known as the Town Rolls or lists of such citizens.

VI.

That the defendant acting in its capacity, as guardian or trustee, for said Creek Nation, and desiring to abolish its tribal government, to divide among the citizens of said nation, the communal property thereof, and to wind up the affairs of said nation, with a view of including said lands within a new State of the Union, passed what is known as the Curtis Act, approved June 28, 1898 (30 Stat. 495), under the terms of which defendant assumed full administrative control over the property and affairs of plaintiff; and defendant thereafter entered into two certain agreements known as the Original Creek Agreement (31 Stat. 861), and the Supplemental Creek Agreement (32 Stat. 500), with said nation, whereby the United States agreed to act as trustee in dividing said property equally among those lawfully entitled to participate in its distribution.

VII.

That Section 21 of said Curtis Act provided in part as follows:

> "Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other nations" (Creek) "eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such as may have law-

ful right thereto, and their descendants born since such rolls were made, * * *."

* * *

"Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

VIII.

The Original Creek Agreement, approved by Act of May 1, 1901, 31 Stat. 861, authorized the Commission to the Five Civilized Tribes to allot "to each citizen one hundred and sixty acres" of Creek national domain Section 3); and Section 28 thereof provided in part that—

"* * * all citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes', shall be placed upon the rolls to be made by said Commission under said act of Congress, * * *

"All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; * * *

"The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made and to no other persons."

Other provisions for the enrollment of children born subsequent to April 1, 1899, and living on the dates specified, were made in the Supplemental Creek Agreement, approved by Act of June 30, 1902, 32 Stat. 500, the Act of March 3, 1905, 33 Stat. 1048, and the Act of April 26, 1906, 34 Stat. 137.

Under said provisions of the Curtis Act and said Creek Agreements the defendant, as trustee of the Creek Nation, was required to make correct rolls of citizens of said Creek Nation; eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, and enrolling such only as may have lawful right thereto.

IX.

That to carry out the terms of said trust so assumed by it, said defendant required that the tribal authorities of plaintiff turn over to its officers and

agents, all of their said records and rolls of said citizenship of said nation. That said defendant directed its officers and agents to add to such tribal rolls such persons as they found to be citizens of said nation.

X.

That said officers and agents of defendant, contrary to the terms of said Curtis Act and said Creek Agreements, and in violation of the rights of plaintiff, added to said rolls of citizenship in said nation, the names of some 300 persons who were not entitled to share in the property of said nation; that said officers and agents of defendant made erroneous enrollments of citizens of plaintiff who were not living on April 1, 1899, made erroneous enrollments of persons who were non-citizens of plaintiff tribe, made duplicate and triplicate enrollments of one and the same person, made erroneous enrollments of children of citizens in violation of said laws governing such enrollments, and made many other mistakes as the proof herein will definitely show.

XI.

That said enrolling officers of defendant had no jurisdiction under said Curtis Act and Creek Agreements to enroll persons on the Creek tribal rolls who were not living on April 1, 1899, or who were not Creek Indians, or to make duplicate and triplicate enrollments of one and the same person, or to place fictitious persons on said Creek rolls.

XII.

That at an early date the duly consituted authorities of plaintiff, learning and being informed that

said officers and agents of defendant were thus adding to said rolls of citizenship in said nation the names of a large number of persons who were not entitled to citizenship in said nation and were making other errors in said enrollment that would prejudice the rights of plaintiff, endeavored to ascertain for the purpose of correcting said errors, what names said officers and agents of defendant were adding to said rolls.

XIII.

That the Principal Chief and officers of said nation, and the National Attorney thereof, were refused by said officers and agents of defendant the right to inspect said rolls being then prepared. That upon application to the Secretary of the Interior and the Commissioner of Indian Affairs, by said officers of plaintiff, for said information and said right to inspect said rolls, said Secretary and said Commissioner did refuse to let plaintiff's said officers inspect said rolls.

XIV.

That said rolls were thus kept secret, and were kept from the knowledge of the constituted authorities of said Creek Nation, until the same, under the laws and rules established by defendant, became final and irrevocable on March 4, 1907, as provided in the Act of April 26, 1906 (34 Stat. 137).

XV.

That each of said persons thus added to the citizenship rolls of said Creek Nation received 160 acres of the Creek national domain or a total of approximately 48,000 acres, and a large amount of the funds

of said Creek Nation, the exact amount of such acreage and funds so received being unknown to your petitioner, but being within the knowledge of the officers and agents of defendant.

XVI.

That during the time of said enrollment and allotment of the citizens of plaintiff, the officers and agents of defendant, having full charge of said work, were guilty of misconduct unbecoming to their duties as trustees of said Creek Nation in carrying out the agreements with plaintiff; that the Chairman of the Dawes Commission, while actually engaged in said enrolling and alloting work, personally organized the Canadian Valley Trust Company, an organization chartered to deal in Indian lands within the Indian Territory, and said Chairman became president of said company and the holder of considerable stock therein; that the offices of the Dawes Commission were moved from the first floor of the building in which they were located to the second floor thereof, and the offices of said Canadian Valley Trust Company were moved in on the first floor of said building, and communication between the offices of said company and the Dawes Commission was maintained by means of a spiral stairway; that said Chairman was also an officer and stockholder in other such companies within the Indian Territory. That many of the other members and employees of said Dawes Commission were also officers and stockholders in the above company and other such companies within the Indian Territory.

That said companies were thus given a seeming official status, and said officers and agents of defend-

ant, although denying to the Creek Nation and to other land companies access to said Creek rolls, yet used the information from said rolls, which they had daily before them, to further their own personal interests and the interests of said land companies in which they were officers and stockholders to the disadvantage of plaintiff, and in disregard of their duties under said Creek Agreements, of exacting fiduciary standards, and in violation of fair and honorable dealings between plaintiff and defendant.

XVII.

That all the power and control of the Dawes Commission under the Curtis Act and Creek Agreements over Creek rolls, was transferred to the Secretary of the Interior, by Act of March 3, 1905, 33 Stat. 1048, 1060, which provided in part as follows:

> "That the work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior, and that all the powers heretofore granted to the said Commission to the Five Civilized Tribes are hereby conferred upon the said Secretary on and after the first of July, nineteen hundred and five."

XVIII.

That before said rolls became final, the defendant had knowledge, or ample means of knowledge, either through its own investigations or by the aid of plaintiff, that many errors and mistakes had been made in enrolling the citizens of plaintiff, and although having the power properly to correct same, yet defendant did not do so, but instead permitted said erroneous enrollments to stand until they became irrevocable, thus confirming said wrongs to

plaintiff and prejudicing the rights of plaintiff to its lands and funds so wrongfully allotted and paid to said erroneous enrollees.

XIX.

That the Secretary of the Interior endeavored to correct some of said errors by striking from the approved rolls, the names of certain known erroneous enrollees. However, said action was taken without due notice and a hearing to the interested parties, and such action was held to be arbitrary and in violation of due process of law (United States v. Wildcat, 244 U. S. 111). Therefore, no proper action was taken by defendant to correct said errors, and plaintiff suffered the loss of its lands and funds allotted and paid to said erroneous enrollees.

XX.

That plaintiff endeavored to obtain redress from defendant by suit filed under the provisions of the jurisdictional Act of May 24, 1924, 43 Stat. 139, authorizing plaintiff to adjudicate its legal and equitable claims against defendant arising from and growing out of treaties, agreements, and Acts of Congress. However, the Court held that under the said act it had no power to grant the relief requested (The Creek Nation v. United States, 92 C. Cls. 346).

XXI.

That at all times mentioned herein the United States was the guardian and the Creek Nation was its dependent Indian ward; that as such guardian the United States was in duty bound to preserve and protect plaintiff from the loss of its lands and

funds, and the dealings of the United States with its Indian ward are to be judged by the most exacting fiduciary standards; that under said rules, the defendant should be required to recompense plaintiff for the loss of its lands and funds occasioned by the mistakes made by defendant and complained of herein.

XXII.

That should the Commission hold that the plaintiff is not entitled to redress from defendant for the mistakes herein complained of, and for the negligence and failure of defendant to correct said errors before said rolls became final, or under the rules of exacting fiduciary standards, the plaintiff avers that it is entitled to redress under the principles of fair and honorable dealings between plaintiff and defendant, without regard to any existing rule of law or equity, for the loss of its lands and funds under the circumstances set forth herein.

WHEREFORE, the plaintiff prays:

1. That the decisions of the Dawes Commission, in placing said erroneous enrollees on the Creek tribal rolls, in violation of the Curtis Act, the Creek Agreements, and the said Acts of June 30, 1902, March 3, 1905, and April 26, 1906, without jurisdiction, and by accident or mistake, be revised and corrected; and that the Commission award plaintiff judgment against defendant for the value of plaintiff's lands allotted to said erroneous enrollees, and for the amount of plaintiff's funds paid to said erroneous enrollees; together with interest on same to date; or

2. That plaintiff be awarded judgment for the value of the lands and funds thus lost to plaintiff, because of the negligence of defendant, the guardian of plaintiff, in failing to correct said errors before said Creek tribal rolls became final; and which failure of defendant violated exacting fiduciary standards; or

3. That plaintiff be awarded judgment against defendant for the loss of its lands and funds, thus occasioned, for the failure of defendant to deal honorably and fairly without regard for any rule of law or equity;

4. And for such other and further relief as to the Commission may seem just and proper.

Respectfully submitted,

THE CREEK NATION,
Plaintiff,
By PAUL M. NIEBELL,
Its Attorney of Record,
1201-19th Street N. W.,
Washington 6, D. C.

APPENDIX B

Before the Indian Claims Commission

Docket No. 169

THE CREEK NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER

[Filed October 17, 1956]

Comes now the defendant, by its Assistant Attorney General, and for answer to the petition filed herein alleges and states:

First Defense

1. The petition fails to state a claim against defendant upon which relief can be granted.

2. The Commission lacks jurisdiction over the subject matter.

3. The petition fails to state facts sufficient to constitute a cause of action for the plaintiff and against the defendant.

4. Defendant moves the Commission for (a) an order dismissing the petition as being too indefinite and insufficient to state a cause of action or to inform the defendant of the matters and things therein attempted to be alleged, or in the alternative to make the allegations in said petition (in particular paragraphs X and XIV) more specific

so that the petition will set forth the individual names of the persons who were allegedly added to the Creek citizenship rolls in violation of plaintiff's rights; the names of persons who were erroneously enrolled as citizens of the Creek Nation; the names of defendant's officers and agents who allegedly perpetrated the erroneous acts of enrollment; the description of the land allegedly received by such purported erroneously enrolled persons; the amount of money allegedly paid by defendant to each of such purported erroneously enrolled persons; the dates on which the purported erroneous enrollments, illegal allotments and unfair expenditures took place; and the alleged mistakes of defendant complained of by plaintiff.

Second Defense

5. Defendant admits the allegations in paragraphs I and II of the petition.

6. Answering paragraph III of the petition, defendant admits that prior to the passage of the Curtis Act, approved June 28, 1898 (30 Stat. 495), the people comprising the Creek Nation occupied land located in what is now the State of Oklahoma. The remainder of said paragraph is denied as too indefinite to require an answer.

7. Defendant admits the allegations of paragraph IV of the petition.

8. Answering paragraph V of the petition, defendant admits that the plaintiff's rights, if any, in and to any land or funds were held as a communal estate by plaintiff for the benefit of its individual members. Defendant further admits that prior to the passage of the Curtis Act, the right of the individual citizen or member of the Creek Nation to participate in the communal property was governed by such laws of the Creek Nation as were not in conflict with its treaties with defendant or with the laws of defendant. Defendant further admits that the plaintiff, prior to the passage of the Curtis Act, maintained Town Rolls or lists of citizens of the Creek Nation, but defendant denies that such lists were the sole evidence of citizenship.

9. Answering paragraph VI of the petition, defendant admits that the Curtis Act, approved June 28, 1898 (30 Stat. 495), was enacted for the purpose of winding up the affairs of the Creek Nation by distributing lands and other communal property in severalty among the citizens of the Creek Nation, and that after the enactment thereof the defendant entered into two certain agreements with the plaintiff, which agreements were respectively known as the Original Creek Agreement (31 Stat. 861) and the Supplemental Creek Agreement (32 Stat. 500). Defendant denies the remainder of said paragraph.

10. Answering paragraph VII of the petition, defendant admits the accuracy of the quoted excerpt of Section 21 of the Curtis Act.

11. Answering paragraph VIII of the petition, defendant admits that under the Original Creek Agreement approved by Act of March 1, 1901, 31 Stat. 861, the Commission to the Five Civilized Tribes was authorized to allot 160 acres to each

Creek citizen. Defendant further admits the accuracy of the quoted excerpt of Section 28 of said Act of March 1, 1901, and that provisions for the enrollment of children were incorporated in the Supplemental Creek Agreement, approved by Act of June 30, 1902, 32 Stat. 500; the Act of March 3, 1905, 33 Stat. 1048; and the Act of April 26, 1906, 34 Stat. 137. Defendant denies the remainder of said paragraph.

12. Defendant denies the allegations of paragraphs IX, X, XI, XII, XIII, XIV, XV and XVI. Defendant alleges that the Dawes Commission took every reasonable precaution to prepare accurately the citizenship rolls and to allocate properly the communal property. Defendant further alleges that such preparation of the roll and such allocation of property by the Dawes Commission, as approved by the Secretary of the Interior, were ratified, accepted, and confirmed by plaintiff.

13. Defendant admits the allegations of paragraph XVII of the petition.

14. Defendant denies the allegations of paragraphs XVIII and XIX of the petition, except that defendant admits that an action was begun by it (in which action plaintiff intervened) to ascertain if the name of Barney Thlocco was erroneously enrolled as a member of the Creek Nation (*United States* v. *Wildcat*, 244 U.S. 111). Defendant alleges that the Supreme Court held that Barney Thlocco was properly enrolled and that the Secretary of the Interior was in error in attempting to strike Thlocco's name from the Creek Roll.

Defendant further alleges that testimony was adduced in said case of *United States* v. *Wildcat* to the effect that "whenever any question was raised by the Creek Nation or its attorney with reference to the right to enrollment, or for any reason as to whether the applicant was living or dead, there was generally testimony taken" to enable the Commission (Dawes) to reach a decision. Defendant further alleges that the Dawes Commission was a quasi judicial tribunal created by and with the consent of the plaintiff and that membership rolls established by it are not subject to attack in a collateral proceeding before the Indian Claims Commission.

15. Answering paragraph XX of the petition, defendant admits that plaintiff under the provisions of the Jurisdictional Act of May 24, 1924, 43 Stat. 139, endeavored to obtain redress from defendant for its "legal and equitable claims" arising from and growing out of treaties, agreements and acts of Congress, through petitions filed in the Court of Claims, among which petitions was the petition filed in Case No. F-373, *Creek Nation* v. *The United States*, 92 C. Cls. 346. Defendant says that the allegations in the petition, as amended, filed in case No. F-373 were substantially the same allegations as contained in plaintiff's present petition. Defendant denies that the Court of Claims held under the Jurisdictional Act of May 24, 1924, it "had no power to grant the relief requested" but this defendant avers the truth to be that the Court of Claims refused to grant the relief re-

quested and held that the allegations of errors and irregularities complained of by the Creek Nation were insufficient to form a basis for voiding the decrees of the Commission to the Five Civilized Tribes.

16. Defendant denies the allegations of paragraphs XXI and XXII of the petition.

Third Defense

17. Defendant alleges that in all of the transactions complained of in plaintiff's petition, the defendant treated and dealt equitably, honorably and fairly with the plaintiff.

Fourth Defense

18. Defendant alleges that plaintiff's petition contains no allegations of acts of fraud, duress, mistake, unconscionable advantage, unconscionable consideration, or unfair and dishonorable dealings on the part of this defendant. Defendant further alleges that the facts and subject matter alleged in said petition, other than the unfounded and unpredicated conclusions of the pleader as to "fair and honorable dealings" are the same as those involved in the case of *Creek Nation* v. *United States,* 92 C.Cls. 346 (1941). Defendant further alleges that a full accounting of the expenditures complained of in plaintiff's petition was rendered in the case of *The Creek Nation* v. *United States,* 78 C.Cls. 474 (1933). No genuine issues are therefore presented by plaintiff's petition and the matters and things complained of by plaintiff are *res judicata.*

Fifth Defense

19. Defendant adopts and incorporates herein the foregoing paragraphs numbered 1 through 18 and says that none of the acts or the expenditures complained of by plaintiff were improperly done or expended by defendant. Defendant alleges that all of said acts or expenditures were done or made pursuant to agreements with plaintiff, under the plenary authority of Congress, and in equity and good conscience, and that if plaintiff has any claims against defendant based upon any of the matters alleged in the petition (which defendant specifically denies), such claims were fully cancelled, waived, adjusted and settled between the parties by the decisions rendered in the cases named in foregoing paragraphs; by the accounts heretofore rendered, computed and stated between the parties hereto; and by the plaintiff's acceptance of the benefits of the acts done and performed by this defendant pursuant to the Act of Congress of June 10, 1896 (29 Stat. 339); the Act of June 7, 1897 (30 Stat. 84); the Act of June 28, 1898 (30 Stat. 495); the Act of March 1, 1901 (The Original Creek Agreement, 31 Stat. 861); the Act of June 30, 1902 (Supplemental Creek Agreement, 32 Stat. 500); the Act of March 3, 1905 (33 Stat. 1048); the Act of April 26, 1906 (34 Stat. 137); the yearly appropriation Acts since 1898; and the agreements executed thereunder. Plaintiff is therefore estopped from seeking judgment for any of the sums prayed for in the petition.

Sixth Defense

20. The United States has, from time to time, although under no obligation to do so, expended on plaintiff and for plaintiff's benefit, large sums of money out of gratuity appropriations, the exact amount of which is unknown to defendant at this time; and if it should be determined that defendant is liable to plaintiff in any amount, defendant is entitled to the allowance of said expenditures out of said gratuity appropriations as an offset, and said expenditures will be set out by an amendment hereto under Rule 12.

Seventh Defense

21. Defendant, while at all times denying that the plaintiff is entitled to any recovery, alleges that, if any sums should be found due the petitioner, plaintiff is not entitled to interest thereon.

WHEREFORE, having fully answered the petition of the plaintiff, defendant prays that the petition be dismissed and that the plaintiff recover nothing from the defendant.

PERRY W. MORTON,
Assistant Attorney General.

JAMES G. SHARON, JR.,
Attorney for Defendant.

CERTIFICATE

I hereby certify that on the day of October, 1956, ten (10) copies of the above and foregoing answer were mailed to the attorney for the plaintiff, Mr. Paul Niebell, 1201 19th Street, N.W., Washington 6, D. C.

JAMES G. SHARON, JR.,
Attorney.

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APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 4-77

Ind. Cl. Comm. Docket No. 169
39 Ind. Cl. Comm. 383 (1977)

THE CREEK NATION)	Indian claims; discretion of Indian Claims Commission as to method of valuation under "fair and honorable dealings" clause
)	
v.)	
)	
THE UNITED STATES)	

Paul M. Niebell, attorney of record, for appellant.

James E. Clubb, with whom was *Assistant Attorney General James W. Moorman,* for appellee.

Before DAVIS, *Judge,* Presiding, NICHOLS and BENNETT, *Judges.*

ORDER

Previously the Indian Claims Commission determined, under the "fair and honorable dealings" clause of the Indian Claims Commission Act (25 U.S.C. § 70a(5)), that the Federal Government was liable to appellant Creek Nation on account of the loss to the Nation of 142 separate and scattered allotments of Creek tribal lands in Oklahoma which were wrongfully allotted in 1907 by the Government to non-members of the Nation. 24 Ind. Cl. Comm. 238 (1970). After a trial

on the amount of recovery, the Commission decided that appellant should be awarded $1,115,706.20 for these improper allotments. 39 Ind. Cl. Comm. 383 (1977); 40 Ind. Cl. Comm. 1 (1977). The Creek Nation appeals from the major elements of this award; the Government has not filed a cross-appeal. The court has considered the record, the briefs, and the oral argument, and now rejects appellant's appeal and affirms the Commission.

In reaching its determination on amount, the Commission first calculated the fair market value of the surface of the 142 improper allotments as of March 4, 1907 (the agreed upon date for the loss by the Creek Nation of these allotments), reaching the figure of $430,324.65; then the Commission added an increment of $110,000 for known and potential coal deposits under the lands; then another $550,000 for known and potential oil and gas deposits; and finally an increase of $25,381.55 for Creek tribal funds paid in cash to erroneous allottees. The total came to $1,115,706.20 since no offsets were claimed by the Government in this docket. The appellant challenges only the surface valuation of the land, and the amount allowable for oil and gas.

In passing upon the amount of an award under the "fair and honorable dealings" clause, we must always remember that the Commission has discretion as to the method or formula it adopts, as well as in the actual amounts it finds owing, and that this court can overturn the Commission's determinations only if they are an abuse of discretion (*i.e.* arbitrary or capricious) or unsupported by substantial evidence on the record as a whole. That is the burden of our holding in *Seminole Nation v. United States,* 203 Ct. Cl. 637, 654, 492 F.2d 811, 821 (1974), where we left it to the Commission to decide, in its discretion, whether to give fair market as of the date of "taking" (in the non-

eminent domain sense), or the rents and profits derived from the station reservations, or a combination of both standards, or some other measure. We did not mandate any of these criteria. Appellant thinks that where there exists, as here, a "special relationship" between the Indians and the Government, a breach by the defendant of that relationship, falling under the "fair and honorable dealings" clause, necessarily calls for the most generous standard of recovery, but we see nothing in the Claims Commission Act or in our decisions which requires the separation of that particular type of clause (5) case from other transgressions of "fair and honorable dealings." For all clause (5) cases the overall criterion is monetary redress for less-than-fair-and-honorable dealings, and in every case the Commission must exercise its fair discretion as to what that redress should be.

In this instance the Nation says, particularly with respect to oil and gas, that the Commission had to award the actual profits from oil and gas garnered from the 142 allotments down through the years after 1907. This may possibly have been a permissible method of determining quantum, but the Commission was within its discretion to decide that the land should be valued, in all its aspects, as of March 4, 1907. This is a land case and thus far the uniform practice has been in all "takings" of land (again, in the non-eminent domain sense) under the "fair and honorable dealings" clause, to use the fair value of the "taken" land as of the date of "taking." The one actual decision appellant cites as showing that fruits have been awarded (*Makah Tribe v. United States*, 40 Ind. Cl. Comm. 131 (May 4, 1977)) did not involve land but government promises of help in carrying on fishing and other maritime activities. We cannot say that the Commission exceeded its discretion in adhering to its past practice in land- "taking" cases.

Similarly, we are unable to find an abuse of discretion in the figures the Commission adopted for surface value (as of March 4, 1907) and for oil and gas value (as of the same date). There was conflicting evidence by expert witnesses on the surface value, and the Commission had a range within which to choose. It concluded that the 22,737.21 acres (contained in the 142 erroneous allotments) had a surface fair market value of $430,324.65, an average of $18.92 per acre. Under the review standard which binds us on factual issues (see, *e.g., Iowa Tribe of Iowa Reservation v. United States*, 195 Ct. Cl. 365, 368-69 (1971), *cert. denied*, 404 U.S. 1017 (1972); *Sac and Fox Tribe v. United States*, 161 Ct. Cl. 189, 207, *cert. denied*, 375 U.S. 921 (1963)), we cannot say the Commission erred. There was sufficient evidence to support this result (though there may also have been evidence to sustain a higher sum).

As for oil and gas, appellant's expert concentrated on the actual profits since 1907 of the 142 wrongful allotments, and, as we have pointed out, the Commission had the right to reject that approach and to value the oil-and-gas component as of March 4, 1907.[1] At that time there was no oil or gas production on any of these tracts, and it was uncertain how much of these minerals underlay any or all of these widely scattered pieces of land. There is evidence that $25 per acre was considered (early in 1907) a fair estimate of the value of an oil lease in the general area. The Commission added $550,000 for known and potential oil and gas deposits to the $430,324.65 it had found for the surface value of the

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[1] We do not mean to say that no part of the report of plaintiff's expert was relevant to value as of that date, but it is plain that large parts of the report had no substantial bearing on value as of 1907 because they related to oil production or leases which were too far removed in time.

22,737.21 acres. With the record as it is, we are unable to characterize this determination as arbitrary or capricious or as unsupported by substantial evidence on the record as a whole.

IT IS THEREFORE ORDERED AND CONCLUDED that the determination of the Indian Claims Commission, insofar as appealed from, is

Affirmed.

BY THE COURT

/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

[Apr 4, 1978]

APPENDIX D

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,
Plaintiff,
v.
THE UNITED STATES OF AMERICA,
Defendant.

Docket No. 169

Decided: February 17, 1977

Appearances:

Paul M. Niebell, Attorney for Plaintiff.

James E. Clubb, with whom was Assistant Attorney General Peter R. Taft, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

The matter presently before the Commission for its consideration is a determination of the fair market value of 142 separate allotments of land in what is now the State of Oklahoma. These lands were owned by the Creek Nation in fee simple, but were lost to them by defendant's action in placing individuals on the final rolls of the Creek Nation who were not entitled to such enrollment, and thereafter allotting to each of these individuals approximately 160 acres of Creek tribal lands. The 142 erroneous allotments represent 212 separate and non-contiguous tracts totaling 22,737.21 acres.

The parties have agreed that the 142 allotments set forth in joint Exhibit 1-V constitute the individual erroneous allotments. These allotments are scattered throughout the former Creek Nation and cover parts of nine counties created out of the Creek domain when Oklahoma became a state on November 16, 1907.

The date of valuation is March 4, 1907. The issue of liability has been determined by the Commission in favor of the plaintiff at 24 Ind. Cl. Comm. 269, December 14, 1970.

General Background

The lands which are at issue in this case are found in the following counties: Creek, Hughes, McIntosh, Muskogee, Okfuskee, Okmulgee, Rogers, Tulsa and Wagoner. Some of the subject tracts are to be found within the townsites of Broken Arrow and Sand Springs.

In connection with the allotment process, the subject lands, along with lands comprising the rest of the Creek Nation, were classified under the auspices of the Dawes Commission. Classification began on December 1, 1900, and was completed about April 15, 1901. In a little over four months, 3,072,813.16 acres were classified. Only the surface of the land was examined. No effort was made to determine the mineral potential that existed in the subsurface. The sole function of the surveyors was to examine and grade the land in forty acre tracts for its fertility, topography, etc. Given the amount of land to be classified, the surveyors could not, of necessity, do a thorough job. They simply walked up one side of a tract and down the other. They could not obtain a comprehensive view by such a cursory examination.

The grading system was divided into ten classifications within which were eight additional subclassifications beginning with the best land and ending with the least desirable. Classification was made without regard to the land's location, proximity to markets or value.

The land was appraised by a committee appointed by and under the direction of the Dawes Commission. By utilizing the classifications made, the appraisal committee adjusted the prices without examining the land. Adjustments were made for proximity to railroads and towns. When these appraisals were made however, not all the railroads had been constructed through the Creek Nation and not all the towns had been established that were in existence on the valuation date of March 4, 1907. The statutory price of $6.50 per acre was applied to the best lands, and lands of lesser quality were accordingly valued downward from that price to fifty cents per acre. The $6.50 figure, although set by statute, appears to be totally arbitrary in nature. It was designed to provide each allottee with land worth $1,040.00 per allotment.

Only the surface of the lands was valued. Minerals were not valued because the land would not have been allotted had it been known that there were minerals beneath the surface. It was supposedly the policy of the Department of the Interior to hold mineral lands for the benefit of all members of the tribe. There is no evidence, however, to indicate that defendant made any effort to determine the existence of minerals under the Creek lands.

Because the 142 allotments at issue were spread across the Creek Nation there is no one characteristic which can be applied to all of the tracts. The evidence tends to indicate, however, that the tracts were suitable for several different uses, those most prevalent being agriculture and grazing.

The early settlers raised some corn and livestock, but depended on hunting and fishing for subsistence. By the early part of the twentieth century, the population of the Indian Territory had grown substantially, especially after 1904, when restrictions were removed from the rights of non-Indian allottees of the Five Civilized Tribes ("freedmen") to dispose of land. Most non-allotted land was sold or leased to white settlers.

The land itself was generally rolling, with some portions being arable, other forested, and still others barren. There was substantial drainage as many rivers and streams flowed across the Creek lands. The climate was generally good, the rainfall adequate, and the growing season long. The soil was varied, and ranged from fertile to arid. The vegetation consisted of various trees and grasses. There was a broad range of crops, with corn and cotton being the principal cash crops. There was an adequate network of roads and railways to carry the area's production to several different markets.

Measure of Damages

Defendant's position with respect to the measure of damages is that the plaintiff is entitled to the fair market value of the 142 allotments as of March 4, 1907.

Plaintiff has built its theory of damages upon the following language which appeared in the Court of Claims opinion in *Seminole Nation v. United States*, 203 Ct. Cl. 637 (1974), *aff'g in part, rev'g in part*, Docket 247, 27 Ind. Cl. Comm. 141 (1972):

> . . . It was not fair and honorable for the 1906 Act to vest those tracts [located in municipalities] in the municipalities *without providing fair compensation* to the Seminole Nation. The United States is properly liable, under the fair and honorable dealings clause, *for the monetary damage suffered by appellant through this statute.* We leave to the Commission on remand to determine the appropriate compensation – whether it should be fair value as of the date of vesting in the towns and cities, the rents and profits derived from the lands, a combination of both standards, or some other measure.[11]

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11 The defendant is very wide of the mark when it urges that appellant has no standing under the fair and honorable dealings clause (clause 5) to point to railroad activities after March 1, 1909, because the abandoned station reservations became vested as a matter of law, under the 1906 Act, in the adjoining owners or municipalities on that date. Clause 5 is not limited to legal rights, and the Nation can show that the destruction of its legal rights, as of March 1, 1909, even if constitutional, caused it injury which should now be redressed in fair measure under that provision of the Claims Commission Act. If the railroad's gains after 1909 are taken into account, it will not be because appellant is "legally" entitled to such sums but because these gains are considered an appropriate and equitable measure of redress under clause 5. [203 Ct. Cl. at 654; emphasis added.]

In the particular circumstances of this case, plaintiff's position is that the proper measure of damages consists of the cumulative value of the allotments as of March 4, 1907, and the value of the owner's share of products derived from said allotments, namely the lease bonus and rental values of the tracts for mineral development, and a royalty on oil, gas, and coal extracted from these lands. Plaintiff's assertion of entitlement to a royalty on actual mineral production is based upon the equitable doctrine of tracing.

We do not believe that the language of the *Seminole* case can be construed as plaintiff would have us construe it. We

interpret the court's language in the *Seminole* case to mean that the United States is liable under the fair and honorable dealings clause (clause (5)) of our act for the monetary damage caused a plaintiff as a result of the Government's unfair and dishonorable act of depriving that plaintiff of property without fair compensation.[1] The language of the *Seminole* case further directs the Commission to determine the appropriate and equitable measure of redress to compensate the plaintiff for the injury suffered by deprivation of its property rights and gives illustrative alternative, not cumulative, examples of what measures might be appropriate in that case.

Under the authority of the *Seminole* case, the Commission has discretion to determine the appropriate and equitable measure of redress to compensate a plaintiff for its property losses. In the instant case, it is our opinion that damages based upon fair market value of the lost property as of the date of taking are the proper measure. Damages so determined best reflect that which we must measure; namely, what plaintiff lost, not what defendant (or third parties) gained. *See Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910); *Confederated Salish and Kootenai Tribes v. United States*, 189 Ct. Cl. 319, 322 (1969). In adopting such a measure we are also following the unbroken line of decisions in the Court of Claims holding that, in moral claims for deprivation of Indian tribal property rights, damages are measured based upon the value of the property right on the date the tribe was divested of that right. *E.g. United States v. Emigrant New York Indi-*

[1] Earlier in the same opinion, the court stated that the ". . . general rule . . . is that tribes should normally be paid when their recognized or fee *property* is transferred by Congress to others outside the tribe." 203 Ct. Cl. 652, emphasis added.

ans, 177 Ct. Cl. 263, 285 (1966); *United States v. Kiowa, Comanche and Apache Tribes*, 143 Ct. Cl. 534, 541-42 (1958); *Shoshone Tribe v. United States*, 85 Ct. Cl. 331 (1937), *aff'd*, 340 U.S. 111 (1938). *See also Sac and Fox Tribe v. United States*, 179 Ct. Cl. 8, 28 (1967) (dictum), *cert. denied*, 389 U.S. 900 (1967). In the recent case (unrelated to the *Seminole* case discussed *supra*) of *Seminole Nation v. United States*, 204 Ct. Cl. 655 (1974), *cert. denied*, 420 U.S. 907 (1975) (*aff'g* Docket 204, 28 Ind. Cl. Comm. 117 (1972)), the court in dictum commented on this matter as follows:

> . . . valuation must be determined on the date of taking. This rule of law is unquestioned in taking cases and is no less viable in this claim for a breach of fair and honorable dealings predicated on an alleged taking. [204 Ct. Cl. at 674]

Equalization Money Paid to Erroneous Enrollees

Equalization money was that money paid to enrollees when they were allotted their land and the value of that allotment (as determined by the Dawes Commission valuation procedures) did not reach $1,040.00. These sums were generally very small amounts. The defendant paid equalization of allotment money from Creek tribal funds to persons erroneously placed upon the tribal rolls of the Creek Nation. The total amount so paid by the defendant was $25,381.55. By raising no objection, the defendant has admitted that this sum is due the plaintiff. Therefore, it is the opinion of the Commission that the defendant is liable to the plaintiff for damages in the sum of $25,381.55 for the amount of Creek tribal funds paid to erroneous enrollees.

Plaintiff's Surface Appraisal

Samuel L. Stokes of Muskogee, Oklahoma, was selected by the plaintiff to determine the surface value of the 22,737.21 acres at issue. He determined that a fair market value for the surface of these lands as of March 4, 1907, was $2,500,000.00. Unfortunately, Mr. Stokes has failed to provide the Commission with the type of concrete evidence it must have in order to evaluate his opinion properly.

Mr. Stokes has valued each tract individually. In his report, he first describes the characteristics given the land in an 1897 U.S. Geological Survey map of the area. This is of some relevance. He then cites soil survey data which was prepared, in almost every instance, from forty to fifty years after the taking date. It is common knowledge that in the intervening years this area of Oklahoma was badly affected by the terrible "Dust Bowl" of the 1930's. Therefore, these surveys are of questionable relevance. A showing is then made of the condition of the soil and terrain based on the 1897 maps and the more current soil surveys. This material is of assistance in reaching some general conclusions regarding the tracts. A judgment is then made as to the highest and best use of the tracts as of March 4, 1907, and as of March 4, 1975. Finally, a dollar value is given for land which was suitable for crops in 1907 and land which was not suitable for crops at that time. As these figures are frequently inconsistent for lands which are similarly described, it is difficult for the Commission to determine on what basis they were reached. For example, in Creek County, Mr. Stokes indicates that in Parcel 45 there are 60 acres suitable for use as cropland and he assigns a value of $50 to each acre. In Parcel 46, he indicates that 55.83 acres are suitable for use as cropland and he assigns to each acre a value of $100. In each of these two parcels, Mr. Stokes

indicates that there are approximately 100 acres which are unsuitable for agricultural use and that each of these acres has a value of $10.

Mr. Stokes makes an ample recitation that the facts on which he based his conclusions evolve more from his general experience in appraising lands than they do on concrete evidence, which he indicates is not avaialble in this case. We have held that the opinion of an expert is worth no more than the facts upon which it is based. *Miami Tribe of Oklahoma v. United States,* Docket 67, 4 Ind. Cl. Comm. 346, 401-403 (1956). The Commission concludes that the opinion of Mr. Stokes is of very little help in determining the value of the subject tracts.

Defendant's Appraisal of Surface Value

Dr. William G. Murray of Ames, Iowa, was selected by the defendant to provide a comprehensive appraisal in this case. Dr. Murray's appraisal report has provided the Commission with a good deal of data useful in valuing the surface of the tracts at issue. Dr. Murray provided a sample of thirty sales within the Creek Nation covering the period from November 1906 to September 11, 1907. These were sales which required the approval of the U.S. Department of the Interior. It is unclear whether these sales were arms-length transactions, but no evidence to the contrary has been presented. The Commission does take notice of the fact that a great many land transactions involving the Creek Nation involved fraud on the part of prospective purchasers. These sales indicated a per acre value of $18.42 which was calculated by dividing the acreage sold (generally 80 or 160 acre tracts) into the sale price. Dr. Murray's report also provided a group of thirty-nine appraisals made under the supervision of the U.S. Indian Agent at Muskogee. These

appraisals did not extend beyond February 1906. However, the 39 appraisals used constituted every known appraisal from December 1905 to February 1906. The per acre value given these tracts by the appraisals was $13.67. Although this figure is substantially below the sales figures, this may be partially due to the earlier time frame. Information regarding a further group of tracts which included the sale price, the price bid, and appraisals covering the period from March 29, 1906, to November 30, 1906, was also submitted. This group of 50 sales, with bids and appraisals, indicated an appraisal value average of $15.52 per acre and a sale price of $18.58 per acre.

In 1910 the first Federal Census available for the Creek lands was made. A per acre valuation of farm real estate was made on a county by county basis. Of the nine counties involved in this case, the average price per acre for such land was $23.00. On a state-wide basis, the average price per acre was $26.00. Using a weighted average, based on the location of the tracts within these nine counties, Dr. Murray calculated a per acre value of $17.83. Using the information from the 1910 census, he then assigned an average surface value of $15.00 per acre to the 140 tracts he valued.

Dr. Murray then provided a tract by tract breakdown, but used as his starting point the $6.50 figure that the Dawes Commission provided for purposes of appraisal. This breakdown included, among other things, descriptions of the topography and soil of each tract. The survey made by the Dawes Commission leaves a great deal to be desired, in that the surveyors only walked up two sides of each tract, and it is not easy to determine the true condition of a 160 acre tract simply by walking up one side and down the other. However, this appraisal is the closest thing available to the

Commission in providing some indication of the condition of the land as of March 4, 1907.

It is unclear to us how the Dawes Commission appraisal figure of $6.50 per acre and the 1910 census figures, when considered together, enabled Dr. Murray to reach a final appraisal figure for these tracts of $492,731.00, which is an average of $21.95 per acre.[2] We can only assume that the differnece between the final appraisal value and the factors Dr. Murray contends were used in reaching his $15.00 per acre valuation (which he states does "not include special value attached to specific tracts because of oil, coal or other features that would add value to these tracts, "Def. Ex. V 19, at 92) are attributable to an enhancement for oil and other minerals located under these tracts. The mathematical approach utilized in reaching this enhancement value is not discernable by the Commission.

Greater emphasis must be given to Dr. Murray's appraisal rather than Mr. Stokes' appraisal because of its inclusion of actual sales data. The Commission and the Court of Claims have stated repeatedly that where comparable sales are available they shall be given great weight in reaching a determination of value. It should be pointed out that we have given no weight to the $6.50 figure originally used by the Dawes

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[2] Dr. Murray overlooked two tracts in making his appraisal, the Sam Toloppa (Creek Roll No. 9,819) allotment and the Angie (Creek Roll No. 9,256) allotment, both in Creek county. They total approximately 282.21 acres. The evidence indicates that Angie was paid equalization funds in the amount of $135.43. This accounts for the fact that the allotments are smaller than the normal 160 acre allotment. Defendant, nonetheless, treated each allotment as having 160 acres with an assigned value of $15 per acre for an aggregate value of $4,800. This sum added to Dr. Murray's appraisal value of $492,731.00 explains defendant's total fair market value of $497,531.00.

Commission. It is clear to us that such a value was totally arbitrary in nature and in no way provides an adequate indication of the true value of the land at issue.

After weighing and analyzing all of the evidence, the Commission concludes, as a matter of law, that the highest and best use of the 22,737.21 acres under consideration is as follows: 14,681.27 acres were best suited for agricultural purposes, 7,095.94 acres were best suited for non-agricultural purposes, and 960 acres were best suited for townsites. The agricultural land was used for the planting of crops, while the non-agricultural land was principally uncleared forest land and soil not suitable for the planting of crops but suitable for the grazing of cattle. The townsite lands were tracts adjacent to or within known towns located within the Creek Nation.

It is the decision of the Commission that the 14,681.27 acres of agricultural land had a fair market value as of March 4, 1907, of $293,625.40; that the 7,095.94 acres of non-agricultural land had a fair market value of $88,699.25; and that the 960 acres of townsite land had a fair market value of $48,000.00. The aggregate value of these 22,737.21 acres is $430,324.65, which is an average per acre value of $18.92.

Enhancement for Subsurface Minerals

This case presents what appears to be a unique problem based upon several factors. One is that we are not valuing one large area of land easily assignable with a single highest and best use or which can readily be subdivided to reflect different highest and best uses of separate sub-areas. In this case we are vauluing 212 small, separate, and non-contiguous tracts totalling 22,737.21 acres, which are polka-dotted across an area of land consisting of over 3,000,000 acres.

Another factor making valuation of these tracts unique stems from the historical circumstances in Oklahoma at the valuation date. In 1907, most of the lands in Oklahoma were in agriculture and grazing or were in their natural state (mostl timbered). At the same time, however, the potential mineral development of much of the state[3] was so apparent that to ignore it would be a totally unreasonable and arbitrary simplification of the actual state of affairs.

Furthermore, data on actual sales must be carefully weighed taking into consideration factors such as that sellers were very often much less sophisticated than were buyers, that buyers were obviously seeking to purchase for as little as possible, and that mineral potential, while evident as to Oklahoma taken as a whole, could not be accurately predicted with respect to any particular small tract of land, given the innate uncertainty of mineral presence and the state of exploration technology. In other words, in 1907 it was accurate to predict that, if one drilled enough holes in Oklahoma, oil would be struck and the expense of exploration would be more than compensated for by the profits derived from the eventual strike. Until a hole was actually drilled, however, the lands were used for agriculture or grazing or remained in their natural state, and if a dry hole were drilled, those uses would continue.

Thus in this particular case, we are faced with the problem of accommodating the established and reasonable legal principle that in valuing lands possessing several exploitable resources, the single highest and best potential use of the land is to be determined, and the land valued in the light of that use rather than by cumulating the value of all the various

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[3] Until November 16, 1907, it was still Oklahoma and Indian Territory. We refer to it as "state" solely for convenience and brevity.

uses to which the land might have been put (*Tlingit and Haida Indians v. United States*, 182 Ct. Cl. 130, 137 (1968)), with the equally well-established principle that the fair market value of lands includes the enhancement value to the land caused by subsurface minerals (*United States v. Shoshone Tribe*, 304 U.S. 111 (1938)).

When large tracts of land are being valued, these principles can quite readily be accommodated to one another. However, in the circumstances we face here, reconciliation of these principles is much more difficult.

Given this dilemma, we have resolved it in the only manner that appears to reasonably reflect the actual state of affairs in Oklahoma in 1907. We have studied the evidence as to each individual tract and have assigned separate highest and best uses to aggregate acreages reflecting surface uses of the lands. In so doing we have, in effect, adopted the type of analysis advocated by defendant's appraiser, Dr. Murray. We have then considered separately the very significant and lucrative potential of the subsurface minerals. In this regard, we have found that Dr. Murray has in large part ignored the mineral potential of the lands at issue. To accurately reflect the enhancement to the value of these tracts of the patently profitable mineral potential we have added to the surface value a separate single figure for coal potential and a separate single figure for oil and gas potential derived from such factors in evidence as instances of the sale of mineral rights, prevailing royalty and lease rates, incidence of leasing of tracts for mineral purposes within the Creek Nation and frequency of successful mineral exploration in the Creek Nation and frequency of successful mineral exploration in the Creek Nation and other parts of Oklahoma. In this regard, we have utilized data from Messrs. Faust and Hassler, plaintiffs mineral appraisers, although we

believe that their method in general is invalid, as we have indicated, *infra*.

Coal Development and Valuation

The region of Pennsylvanian rocks south of the Arkansas River in Indian Territory contained all the principal coal beds in the present state of Oklahoma. This region covered a substantial part of the Creek Nation. Coal was first mined on a commercial basis near McAlester in the Choctaw Nation in 1872. Between 1872 and 1879, companies mining coal in the Choctaw and Chickasaw Nations paid to these tribes over $1,200,000 in royalties and to individual Indians from whom the coal mines were leased over $800,000, or a total of over $2,000,000 in royalties.

The Creeks were aware at an early stage of the existence of coal within their nation. Ward Coachman, Principal Chief of the Creek Nation in 1876, was the first to recommend development of coal as a source of revenue, and under his influence, a law was passed by the Creek Nation in 1878 requiring citizens to pay royalties on all coal offered for sale. In 1881, provision was made for the admission of non-citizen developers in the formation of mining corporations. Under laws passed in 1885 and 1887, leases covering most of the Nation were given corporations formed by Creeks and outside developers.

The Creek Agreement, ratified by the Act of March 1, 1901, 31 Stat. 681, contained no provision for leasing lands in the Creek Nation for mineral purposes. However, prior to the agreement's adoption, the Department of the Interior had granted temporary permission for several parties to mine and ship coal in the Creek Nation. As early as September 1899, the Kansas and Texas Coal Company had mined coal on Creek land under temporary permission granted by the

Interior Department. In September 1901, this company made application for a renewal of the temporary permit to mine coal on land of a Creek citizen who claimed the lands as an allotment. The Department approved the application of this company to continue mining coal on the allottee's land under a contract between the allottee and the mining company with the Department construing the contract as the consent of the allottee. The royalty derived from the coal mined was to be paid to the United States Indian Agent for the Union Agency, Muskogee, Indian Territory, and placed to the credit of the land, and held for the allottee until the final distribution of the Creek lands was made.

No valid permanent mineral leases could be made within the Creek Nation until July 19, 1903, when the Secretary of the Interior issued regulations governing the leasing of minerals, i.e., oil, coal and gas. These regulations required, *inter alia*, that lessees pay lessors a royalty of 8 cents for each ton of coal mined. In 1904, 36 leases were approved by the Department of the Interior under these regulations authorizing twelve companies to mine coal in the Creek Nation. In 1905, 51 such leases were approved and in 1906, 60 leases were approved. Although coal continued to be mined in the Creek Nation after 1906, growth was limited because the coal business depended for its market on home consumption, railroads and generating plants. The development of oil and gas in the Creek Nation at this time further slowed development of the coal industry.

On June 5, 1905, 21 bids were received for cash bonus payments on coal leases in the contiguous Choctaw and Chickasaw Nations. The highest bid was $16.91 per acre and the lowest bid was $5.00 per acre. The average of the 21 bids was $7.75 an acre. All bids were rejected as being too low.

All of the 142 erroneous allotments involved in this case potentially had coal beneath the surface that was of definite commercial value as of March 4, 1907. The mine inspector for the Indian Territory estimated that "4,000 tons per acre is a fair average for the amount of coal that can be secured," and at the going rate of 10 cents per ton, the royalty value alone would amount to $400.00 per acre. In 1907, the average price of coal in the Indian Territory was $3.00 to $3.50 per ton. A prospective purchaser of these 142 tracts would have known the above facts relative to the value of these coal reserves at that time.

The defendant has contended that since there was no evidence introduced regarding the existence of coal on these 142 tracts, no finding of value can be made. The plaintiff has reached a valuation of $7.50 per acre on the basis of the foregoing evidence. The Commission is of the opinion that the evidence does indicate that a reasonably well-informed purchaser would have been aware of the likelihood of coal existing under these 142 tracts on March 4, 1907. However, the evidence also indicates that the majority of leases were made with companies which mined coal in counties other than Creek County and almost one-half of the tracts in this case are located in Creek County. Considering all factors, the Commission is convinced that the potential presence of coal under the tracts in this case is a definite plus factor in respect to the value of the tracts in 1907. We believe that an enhancement in the amount of $110,000 reasonably represents the value of potential coal deposits under the subject tracts as of March 4, 1907.

Oil Development

As early as 1865, it was common knowledge that the Pennsylvanian formation, which subsequent to 1865 and

before 1907, produced substantial quantities of oil and gas in Kansas, also extended south into Indian Territory, and included the Cherokee and Creek Nations. In 1889, oil was discovered in the Creek Nation in what is now McIntosh County. The next oil development in the Creek Nation came when Michael Cudahy of Omaha, Nebraska, secured a blanket lease to search for oil and gas on more than 200,000 acres in the Creek Nation. The first well was drilled in 1894 on what is now the townsite of Muskogee. Further oil development in the Muskogee area was delayed until 1904 when it became possible to obtain good title to the lands.

Federal officials, as well as Indians were persuaded that there was oil in Oklahoma. The Muskogee *Weekly Phoenix* of November 2, 1889, had stated that there were great deposits of oil in the Indian Territory. There were producing wells at Muskogee, Chelsea and Bartlettsville, and vast potential oil fields stretched across the Cherokee and Creek Nations.

In 1899, three oil companies filed applications to lease some 183,000 acres of land in the Creek and Cherokee Nations. However, the Department of the Interior decided that it would not permit the wholesale leasing of Indian land in the manner attempted, but would restrict each company to a tract improved by it, and would grant leases for such tracts only. On May 22, 1899, the Department rejected another application for such a lease. The oil companies were thus unable to secure oil leases for further development on these lands at that time. In defiance of the Department of the Interior, the oil companies resumed drilling in May 1901, in the Creek Nation. This action was considered by the Department "as a brazen,. presumptuous and unwarranted proceeding." In June 1901, a producing well

was drilled at Red Fork, just west of Tulsa, in the Creek Nation, in what is now Tulsa County. The Red Fork development took place during the allotment period in the Creek Nation. Under the provisions of the Creek Agreement, the lands of the individual Creek allottees were restricted against alienation, and the Interior Department was required to supervise the leasing of these lands.

On July 10, 1903, the Department of the Interior promulgated regulations for mining leases covering lands in the Creek Nation, and in his report for the fiscal year ended June 30, 1904, the Commissioner of Indian Affairs stated that a total of 53 oil and gas leases of lands in the Creek Nation had been approved by the Department. As a result of the Act of April 21, 1904, 33 Stat. 189, the restrictions on the sale of lands were removed. One result of this action was that a great many freedmen of the Five Civilized Tribes gave up their lands for what, in many cases, was inadequate consideration.

The Department of the Interior continued to approve oil and gas leases of lands in the Creek Nation subject to restrictions on leasing. In his 1905 report, the Commissioner of Indian Affairs stated that 94 oil and gas leases of Creek lands had been approved by the department. In his 1906 report, the Commissioner stated that the department had approved 126 oil and gas leases on Creek lands. Under approved leases, oil development in the Creek Nation progressed rapidly. In 1904, further development of oil and gas wells was begun in the Muskogee area, in the eastern portion of the Creek Nation. At this time there were 35 or more producing wells in this area and 50 at Red Fork. Operators from all over the mid-continent region flocked to the new development at Muskogee, and many large companies were represented. The oilmen believed the new

development was a forerunner of the opening of another large field in the Creek Nation.

The first great strike was at Glenn Pool, when an 800 barrel well came in on November 22, 1904, at a site about 14 miles south of Tulsa, in the western portion of the Creek Nation in what is now Creek County. This discovery opened up the Glenn Pool which yielded substantial production and attracted oilmen from all over the United States. Its depth was reasonably shallow, the cost of drilling moderate, the oil output was by gas pressure, and the quality of oil was excellent. *The Oil Investors' Journal* for August 3, 1906, gave a glowing appraisal of the potential of this field, which in no small part, aided in the rapid growth of oil operations at this time. The next significant development in the Creek Nation was at the town of Morris, in what is now Okmulgee County, located in the heart of the Creek Nation. The Morris Pool was greatly praised for its potential in articles in *The Oil Investors' Journal* on June 19 and July 5, 1907. Professor Charles N. Gould, the geologist at the State University in Norman, Oklahoma, was quoted as saying in the May 19, 1907, issue of *The Oil Investors' Journal* that only one-third of the future oil fields of Oklahoma had been prospected, and not even one-tenth of the oil potential of Oklahoma had been fully developed.

In order to encourage allottees to permit drilling on their lands, oilmen were prepared to pay substantial bonuses for that right. These bonuses were not based on any specific formula, but usually represented the maximum the oilman was willing to pay. The records of *The Oil Investors' Journal* as well as the reports of the Commissioner of Indian Affairs are replete with examples of large bonuses being paid.

The Oil Investors' Journal in the December 18, 1906, issue reports a bonus of $25,000 paid for a lease on 160 acres. The February 3, 1907, issue reports a bonus paid of $75,000 for a lease on 50 acres, while the February 18, 1907, issue reports a bonus of $80,000 on a one-half interest in a lease on 160 acres.

Experts' Appraisals of Oil and Gas

Joseph Faust and John J. Hassler of Oklahoma City, Oklahoma, were selected by the plaintiff to determine the mineral value of these 142 tracts. Dr. Faust valued the oil in these tracts in three ways. The first was the "true value," the second was the "discounted value" as of 1907, and the third was the "present worth" as of January 1, 1975. In reaching each of these values, a lease bonus and rental was established based on a fixed value of $10.00 per acre. The figure was the same for each of the valuations. The second factor was the royalty value, and this was fixed at $25.00 per acre and was also the same for each of the three valuations. The third factor was the only varying one, and this was based on production value. The "true value" production value was based on actual production, while the "discounted value" and "present worth" values were made by using computer values based on actual yearly production and government bond interest rates which were developed from information contained in computer printouts.

On the basis of their research, Faust and Hassler determined that a figure of $10.00 per acre was a fair lease bonus and rental. They likewise concluded that $25.00 was a fair figure to determine royalty value. These figures were based on their determination of a fair average value of these lands with regard to each type of valuation being determined. The royalty figure of $25.00 per acre takes

into consideration those tracts which had a dry hole drilled, on which no wells had been drilled, or on which wells had been drilled but production had ceased. This figure is predicated on their evaluation of the evidence and their experience in the oil business over the years. The Commission finds that lease bonuses and rentals, with a possible rare exception, were based on leases made after March 4, 1907. The Commission makes the same determination with regard to royalty payments, which are based on production and the production value be it contemporaneous or in future. In all instances plaintiff's experts' values are based on events which occurred after the taking date of March 4, 1907.

In our discussion earlier in this opinion regarding the appropriate measure of damages we reached the conclusion that damages must be based upon the fair market value of the property as of the date of taking. The valuation by plaintiff's experts of the oil under the subject tracts is based entirely upon data relating to post-taking date actual production. The theories utilized by plaintiff's experts amount to no more than a complex application of hindsight which we cannot accept as the sole basis for determining market value as of the date of taking.

As we described earlier, the defendant's appraiser, Dr. Murray, determined that the average per acre value of the lands was $15.00 not including any special value attached to specific tracts based on mineral presence. His final average per acre value for all tracts was $21.95. Although he doesn't say so, he has apparently determined that the average value of mineral enhancement was $6.95 per acre. In his tract-by-tract valuation, he has valued three tracts at more than $50 per acre. All the others are valued a few dollars above or below the $15 per acre average. We believe that Dr. Murray is correct in acknowledging the fact

that minerals enhanced the value of the tracts, but we think he has not attached sufficient importance to the mineral development taking place in Oklahoma at the taking date. As a result, his enhancement value for oil and gas (as well as for coal) we find to be too small.

The evidence indicates that at the valuation date the presence of oil under the lands of the Creek Nation was a matter of common knowledge. Both the Glenn Pool and the Morris Pool were producing at the valuation date. Tracts within the Creek Nation were being leased for oil exploration and, in some instances, large bonuses were being paid for the leases. The incidence of actual oil leases had increased from fifty-three for the fiscal year 1904, to ninety-four for 1905, and to one hundred twenty-six for 1906. During the year 1906, 2,770 wells were drilled in Oklahoma of which 2,266 or seventy-seven percent produced oil. Available figures relating to drilling for the several years immediately subsequent to the valuation date consistently confirm that approximately four out of every five wells drilled within the former lands of the Creek Nation produced oil. Events occurring within a few years of the valuation date, including the development of the Cushing oil field and the increasing incidence of oil leases on the subject tracts, likewise confirm that the expectation commonly held in 1907 that the Creek lands were rich in oil was fully justified.

All of these factors have led us to the conclusion that a substantial increment should be added to the surface value of the one hundred forty-two tracts involved in this case to reflect the enhancement value of oil and gas in the subsurface. We do not believe that bonuses paid for oil leases, although substantial in certain instances, occurred with enough regularity to be a significant factor in determining a reasonable enhancement value for the subject tracts. We believe that the evidence in the record that the prevailing value of

oil leases around the valuation date was approximately $25.00 per acre is the most reliable basis for reaching an enhancement value for these tracts.

The incidence of leases at and in the years immediately following the valuation date, the fact that approximately eighty percent of wells drilled produced oil, and the fact that by the year 1915 approximately one-half of the subject tracts had actually been leased support our conclusion that all of the subject tracts in 1907 were equally attractive as potential producing properties. For these reasons we believe that a single enhancement value of $550,000 for all the subject tracts represents a reasonable increment to reflect known and potential presence of oil and gas under the subject tracts.

In summary, the Commission concludes that the fair market value of the lands in this case as of March 4, 1907, was $1,090,324.65 and that the plaintiff is entitled to recover this amount from defendant. The plaintiff is also entitled to recover $25,381.55, which is the total amount of Creek tribal funds paid to erroneous allottees as equalization money. The total amount the plaintiff is entitled to recover is $1,115,706.20.

/s/ Brantley Blue
Brantley Blue, Commissioner

We concur:

/s/ Jerome K. Kuykendall, Chairman
Jerome K. Kuykendall, Chairman

/s/ John T. Vance
John T. Vance, Commissioner

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,)
Plaintiff,)
v.) Docket No.
) 169
THE UNITED STATES OF AMERICA,)
Defendant.)

Decided: February 17, 1977

ADDITIONAL FINDINGS OF FACT

By the findings of fact numbered 1 to 33, inclusive, and the opinion and order entered herein on December 14, 1970, 24 Ind. Cl. Comm. 238, the Commission determined that the defendant acted unfairly and dishonorably toward the Creek Nation in refusing to provide the Nation with copies of the approved Creek rolls during the enrollment period, and in not taking reasonable precautions to prevent erroneous enrollments (24 Ind. Cl. Comm., at 269). It was ordered that this case proceed to a determination of damages, if any, suffered by the Creeks as a result of defendant's failure to act fairly and honorably toward them.

On June 26 and 27, 1975, hearings were held before the Commission, during which plaintiff and defendant presented both documentary evidence and expert witness testimony on the value of the 142 separate and non-contiguous tracts of land in the former Creek domain in Oklahoma, which constitute the subject matter of this case.

The Commission makes the following findings of fact which are supplemental to those previously entered herein.

34. Erroneous Enrollments and Taking Date. The parties stipulated on June 26, 1975, that the lands which are sub-

ject of this case are 142 erroneous allotments of approximately 160 acres each totalling 22,737.21 acres and consisting of some 212 separate and non-contiguous tracts within the Creek Nation in what is now east-central Oklahoma. The parties further stipulated that the correct valuation date is March 4, 1907, the date the Creek tribal rolls were closed.

35. Counties and Townsites. The counties within which the subject lands are located, are Creek, Hughes, McIntosh, Muskogee, Okfuskee, Okmulgee, Rogers, Tulsa and Wagoner. A portion of the subject lands are located within the townsites of Broken Arrow and Sand Springs.

36. Land Classification. Prior to allotment, the Creek lands were classified under the direction of the Dawes Commission. (See 24 Ind. Cl. Comm. 238, Findings 12-14, at 256-258, where the Commission described the functions of the Dawes Commission.) Only the surface of the land was examined and was graded in 40-acre tracts for its fertility, topography, timber, etc. The schedule for grading the land contained 10 classifications, within which were 8 further subclassifications, beginning with the best land and ending with the least desirable. Such classification was without regard to the land's location, proximity to markets or other factors affecting value. Classification began on December 1, 1900, and was completed about April 15, 1901. In a little over four months, 3,072,813.16 acres were classified.

37. Method of Appraisal for Allotment Purposes. Appraisal of the lands was made by a committee appointed by and under the direction of the Dawes Commission. The committee worked from the classifications of the lands thus made without examining the lands. The statutory price of $6.50 per acre was applied to the best lands, and the lands in the lesser classifications were valued downward from that price, the lowest classification being appraised at 50 cents per acre.

Adjustments were made for proximity to certain railroads and towns. However, when these appraisals were made not all the railroads had been constructed through the Creek Nation, and not all the towns had been established that were in existence on the valuation date of March 4, 1907.

38. Minerals not Valued. Only the surface of the Creek lands were valued. Minerals were not valued because the land would not have been allotted had it been known that there were minerals beneath the surface. It was, in theory, the policy of the Department of the Interior to hold mineral lands for the benefit of all members of the tribe.

39. Surface Condition of the Land. Because these 142 allotments were located within a broad area of the Creek Nation, there is no one characteristic which can be applied to all of the tracts. However, the evidence indicates that the various tracts were suitable for several different uses, those most prevalent being agriculture and grazing.

40. Early Use of Surface Land. The Creek Indians and early settlers on Creek lands settled along the streams and grew small patches of corn and raised livestock, but depended mainly on hunting and fishing for subsistence.

41. Development of Surface Land. With a white population in 1904 of 650,000 in the Indian Territory, the removal of restrictions on lands of the freedmen by the Act of April 21, 1904, 33 Stat. 204, 205; and the right to lease Creek lands under the regulation of the Department of the Interior promulgated on July 10, 1903, agricultural development of these lands proceeded quickly. As a general proposition, lands not subject to allotment were either purchased or leased in 1904 by white settlers.

42. Topography and Elevation. The Creek lands were within the Sandstone Hills Region. They were generally

level to undulating or rolling prairie lands, and were located in the east-central portion of what is presently Oklahoma. The topography consisted of alternating sandstone hills and broad shale valleys. The tops of hills were usually flat and broad. The sandstone areas in some places supported a thick growth of timber, and were used for the stock raising. The shale areas were used in most instances for agriculture. The elevation of the lands ranged generally from 430 to 1100 feet above sea level.

43. Drainage. The Creek Nation was drained by the Cimarron, Arkansas, Canadian, Litte, Verdigris and Grand (Neosho) rivers and numerous tributaries and lesser streams. The majority of tracts in this case were drained by the Cimarron River and its tributaries.

44. Rainfall. The average annual rainfall in the Creek Nation ranges from 35.53 inches in the western part of the Creek Nation (Creek County), to 41.44 inches in the eastern portion (McIntosh County). The rainfall is greatest during the growing season. There was plenty of water for domestic use. Wells found good water from 20 to 60 feet, and were drilled at little expense. On the prairie, water was found in sand or limestone, and was free of alkali. Ridge lands were generally supplied with water from springs. The quality of water in general was excellent. Water for stock was plentiful and unfailing.

45. Climate. The climate was continental, with long and warm summers, tempered with cool night breezes. The winters were moderate, with little snowfall. The average January temperature ranged from 36.2°F. to 40.6°F. The average July temperature ranged from 80.2°F to 82.9°F.

46. Growing Season. The growing season was generally long, ranging from 210 to 225 days. The latest killing frost was in April, and the first killing frost was around the end

47. Soils. The soils on these 142 tracts varied. They ranged from black loam with high fertility to rocky and mountainous with no fertility. An analysis of the evidence of surface condition as presented by the plaintiff in its expert's report, involving 1897 U.S. Geological Survey maps, and the defendant's use of the Dawes Commission survey, indicate that approximately half the total acreage in this case consisted of moderately fertile to very fertile land and the other half consisted of less fertile soils.

48. Native Vegetation. The majority of these tracts were timbered with a large variety of different type trees. There were also numerous types of native grasses. The woodlands were used for cattle grazing. The evidence does not show that there were commercial timber operations nor that the grasslands were used for large-scale cattle grazing.

49. Crops. Crops commonly grown in the Creek Nation were corn, cotton, peanuts, grain and forage sorghums, oats, alfalfa, bermudagrass, wheat, sweet and Irish potatoes, Timothy and Clover, Wild hay, Broom corn, kaffir corn, barley, cowpeas, flax, rye, fruits and vegetables. Corn and cotton were the principal cash crops.

50. Railroads. In 1907 there were 14 railroads operating within the Creek Nation including the Sand Springs Interurban Railway, predecessor in title to the Sand Springs Railway.

51. Roads. Given the non-contiguous nature of these tracts, the quality of the road system is of relative unimportance. It appears that there was a substantial network of dirt roads which traversed the Creek Nation. A large number of the 142 tracts had some kind of road crossing them.

52. Markets. Besides the local markets, other markets for products of the area were Kansas City, St. Louis, Chicago, Minneapolis, Dallas, and points east.

53. Plaintiff's Surface Appraisal. Samuel L. Stokes of Muskogee, Oklahoma, was selected by the plaintiff to give his opinion of the surface value of the 22,737.21 acres at issue. He determined that a fair value for the surface of this land as of March 4, 1907, was $2,500,000.00, which is approximately $110.00 per acre. Stokes valued each tract individually. His report first indicates the description given the land in an 1897 U.S. Geological Survey map of the area. It then cites soil survey data which was prepared, in almost every instance, from forty to fifty years after the taking date. A showing is then made of the condition of the soil and terrain based on the 1897 maps and the more current soil surveys. This work was done by George Stokes, who is a soil expert and agronomist. A judgment is then made as to the highest and best use of the tracts as of March 4, 1907, and as of March 4, 1975. Finally, a dollar value is assigned for land which was suitable for crops in 1907 and land which was not suitable for crops at that time. Mr. Samuel Stokes makes an ample recitation that the facts on which he based his conclusions evolved more from his general experience in appraising lands than they did from concrete evidence, which he indicates is not available in this case.

54. Defendant's Surface Appraisal. Dr. William G. Murray of Ames, Iowa, was selcted by the defendant to provide a complete appraisal in this case. A sample of thirty sales within the Creek Nation covering the period from November 1906 to September 11, 1907 was provided. These were sales which required the approval of the U.S. Department of the Interior. These sales indicated a per acre value of

$18.42, which was calculated by dividing the acreage sold (generally 80 to 160 acre tracts) into the sale price. Also provided were a group of thirty-nine appraisals made by appraisers under the supervision of the U.S. Indian Agent at Muskogee. These appraisals did not extend beyond February 1906. However, the thirty-nine appraisals used constituted every known appraisal from December 1905 to February 1906. The per acre value given these tracts was $13.67. The sale price, the price bid and the appraisal of a further group of tracts covering the period from March 29, 1906, to November 20, 1906, were also submitted. This group of 50 sales with bids and appraisals indicated an appraisal value average of $15.52 per acre and a sale price of $18.58 per acre.

In 1910, the first Federal Census available for the Creek lands was made. A per acre valuation of farm real estate was made on a county by county basis. Of the nine counties involved in this case, the average price per acre for such land was $23.00. On a state-wide basis, the average price per acre was $26.00. Using a weighted average based on the location of the tracts within these nine counties Dr. Murray calculated a per acre value of $17.83. Using the information from the 1910 census he then assigned an average surface value of $15.00 per acre to the 140 tracts he valued.*

Dr. Murray then provided a tract by tract breakdown, but used as his starting point the $6.50 figure that the Dawes Commission provided for purposes of appraisal. This breakdown included among other things a topographical and soil description for each tract. In the survey made by the Dawes

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*Dr. Murray overlooked two tracts. This is explained in note 2, *supra*, of our opinion.

Commission, the surveyors only walked up two sides of each tract, thereby rendering it impossible to determine the condition of the interior of the tracts. However, this appraisal is the closest thing available to the Commission in providing some indication as to the condition of the land as of March 4, 1907.

55. Highest and Best Use. After analyzing and weighing all the evidence, the Commission has determined that the highest and best use of the 22,737.21 acres under consideration is as follows: 14,681.27 acres were best suited for agricultural purposes; 7,095.94 acres were best suited for non-agricultural purposes, and 960 acres were best suited for townsites. The agricultural land was used for the planting of crops. The non-agricultural land was principally uncleared forest land and soil not suitable for the planting of crops but suitable for the grazing of cattle. The townsite lands were tracts adjacent to or in known towns located within the Creek Nation.

56. Commission Valuation of the Surface Lands. The Commission has reviewed all the evidence and weighed the relative merits of the parties' appraisal reports. It is the Commission's decision that 14,681.27 acres of agricultural land had a fair market value as of March 4, 1907, of $293,625.40; that 7,095.94 acres of non-agricultural land had a fair market value of $88,699.25, and the townsite land totalling 960 acres had a fair market value of $48,000.00. The aggregate value of these 22,737.21 acres is $430,324.65, or $18.92 per acre.

57. Location and History of Coal in the Creek Nation. The region of Pennsylvanian rocks south of the Arkansas

River in Indian Territory was distinctly marked off from the northern area by the absence of limestone, and the increased presence of sandstone and coal. These rocks contain all of the principal coal beds in the present State of Oklahoma. This region covered a substantial portion of the Creek Nation. The first record of the presence of coal in what is now eastern Oklahoma was made by French explorers in 1719. Coal was first mined on a commercial scale near McAlester in the Choctaw Nation in 1872. Between 1872 and 1879, companies mining coal in the Choctaw and Chickasaw Nations paid these Indian governments over $1,200,000 in royalties, and to individual Indians from whom the coal mines were leased over $800,000, or a total of over $2,000,000 in royalties.

58. Creek Knowledge of Coal Deposits. The Creeks had known quite early of the existence of coal deposits within their nation. Ward Coachman, Principal Chief of the Creek Nation in 1876, was first to recommend development of the lands as a revenue measure, and under his influence a law was passed by the Creek Nation in 1878 requiring citizens to pay royalties on all coal offered for sale. In 1881, provision was made for the admission of non-citizen developers in the formation of mining corporations. The most important mining laws were passed in 1885 and 1887 through the influence of J.M. Perryman. Under these acts, leases covering most of the Nation were given corporations formed by Creeks and outside developers.

59. Background to Mining Leases under U.S. Department of the Interior. The Creek Agreement, ratified by Act of March 1, 1901, 31 Stat. 681, contained no provision for leasing lands in the Creek Nation for mineral purposes. However, prior to the adoption of the Creek Agreement the Interior Department had granted temporary permission for sev-

eral parties to mine and ship coal in the Creek Nation. The Kansas and Texas Coal Company, since September 1899, had mined coal on Creek land under such temporary permission. In September 1901, this company made application for a renewal of the temporary permit to mine coal on land of a Creek citizen who claimed the lands as an allotment. The department approved the application of this company to continue mining coal on this Creek land, under a contract between the allottee and the mining company, the department construing the contract as the consent of the allottee. The royalty derived from the coal mined was directed to be paid to the United States Indian Agent for the Union Agency, Muskogee, Indian Territory, and placed to the credit of the land, and held for the allottee until the final distribution of the Creek lands should be made.

60. Restriction on Leasing by the United States. No valid mineral leases could be secured in the Crrek Nation until July 19, 1903, when the Secretary of the Interior promulgated regulations governing the leasing of minerals, i.e., oil, gas and coal. These regulations required the lessees to pay the lessors a royalty of 8 cents for each ton of coal mined. In 1904, 36 leases were approved by the Interior Department under the regulations authorizing twelve companies to mine coal in the Creek Nation. In 1905, 51 such leases were approved and in 1906, 60 leases were approved.

61. Development of Coal. The July 14, 1906 report of the Indian Agent for the Union Agency at Muskogee, stated:

> Mention shall also be made of the coal deposits in the Creek Nation, particularly at Henryetta, where there is a considerable quantity of good coal which is sufficiently deep to be mined by shaft. Other small coal deposits are found at different points, but are near the surface and are

> mined only by the 'stripping' process. (Pl. Ex. 26, at 226)

Although coal continued to be mined in the Creek Nation after 1906, the coal business depended for its market on home consumption, railroads and generating plants. The development of oil and gas in the Creek Nation in the 1906-1907 period slowed further development of the coal industry in the Creek Nation.

62. Indications of Coal Value. On June 5, 1905, 21 bids were received for cash bonus payments on coal leases in the contiguous Choctaw and Chickasaw Nations. The highest bid was $16.91 per acre and the lowest bid was $5.00 per acre. The average of the 21 bids was $7.75. All bids were rejected as being too low. All of the 142 erroneous allotments involved in this case potentially had coal beneath the surface that was of definite commercial value as of March 4, 1907. The mine inspector for the Indian Territorty estimated that "4,000 tons per acre is a fair average for the amount of coal that can be secured," and at the going rate of 10 cents per ton, the royalty value alone would amount to $400.00. In 1907, the average price of coal in the Indian Territory was $3.00 to $3.50 per ton. A prospective purchaser of these 142 tracts would have known the above facts relative to the value of these coal reserves at that time.

63. Determination of Coal Value. The defendant has contended that since there was no evidence introduced regarding the existence of coal on these 142 tracts, no value can be attributed to the presence of coal in the subsurface of these lands. The plaintiff asserts that the evidence supports a valuation of $7.50 per acre for coal. It is our opinion that a well-informed purchaser would have been justified in concluding that it was very likely that there were coal deposits in the subsurface of the subject tracts. Upon consideration

of all the evidence relating to the potential presence of coal beneath the subject tracts, we believe that a reasonable increment of $110,000 should be added to the fair market value of these tracts to reflect the value of potential and proven coal deposits.

64. Oil Development in the Creek Nation. As early as 1865, it was common knowledge that the Pennsylvanian formation, which subsequent to 1865 and before 1907, produced substantial quantities of oil and gas in Kansas, also extended south into Indian Territory, and included the Cherokee and Creek Nations. The Pennsylvanian formation was considered the most probable of areas for the production of oil and gas. In 1889, oil was discovered in the Creek Nation in what is now McIntosh County. The next oil development in the Creek Nation came when Michael Cudahy of Omaha, Nebraska, secured a blanket lease for oil and gas on more than 200,000 acres in the Creek Nation, and employed McBride and Bloom of Independence, Kansas, to drill the wells. The first well was drilled in 1894 on what is now the townsite of Muskogee. Further oil development in the Muskogee area was delayed until 1904 when it became possible to obtain good title to the lands.

65. Federal Attitude on Oil. Federal officials and Indians alike believed that there was oil in Oklahoma. The Muskogee *Weekly Phoenix,* of November 2, 1899, had stated that there were great deposits of oil in Indian Territory. There were producing wells at Muskogee, Chelsea, and Bartlettsville, and vast potential oil fields stretched across the Cherokee and Creek Nations.

66. Leasing in 1899. In 1899, three oil companies made applications to lease some 183,000 acres of land in the Creek and Cherokee Nations. However, the Interior Department decided that it would not permit the wholesale leasing of the

Indian land in the manner attempted, but would restrict each company to a tract improved by it, and would grant leases for such tracts only. On May 22, 1899, the Department rejected another application for such a lease. The oil companies were thus unable to secure oil leases for further development in these lands at that time.

67. Action by the Oil Companies. In defiance of the Department of the Interior, the oil companies resumed drilling in May 1901, in the Creek Nation. This action was regarded by the Department "as a brazen, presumptuous and unwarranted proceeding." In June 1901, a producing well was drilled at Red Fork, just west of Tulsa, in the Creek Nation, in what is now Tulsa County. The 1901 Report of the Commission to the Five Civilized Tribes, stated:

> Unusual activities in the matter of selecting allotments was (sic) displayed during the month of June, when the discovery of petroleum was made near the town of Red Fork, in the Creek Nation. For the most part, these applications for allotments in the vicinity were stimulated by the action of speculators, who desired to secure leases from the citizens who might secure the lands in that vicinity in allotment. The Commission exercised all possible care to see that the best interests of the Creek citizens were subserved. (Pl. Ex. 26, at 31)

The Red Fork development was during the allotment period in the Creek Nation. Under the provisions of the Creek Agreement, the lands of the individual Creek allottees were restricted against alienation, and the Interior Department was required to supervise the leasing of these lands.

68. Number of Leases. The Department of the Interior, on July 10, 1903, promulgated regulations for mining leases

covering lands in the Creek Nation. In his report for the fiscal year ended June 30, 1904, dated October 17, 1904, the Commissioner of Indian Affairs stated that a total of 53 oil and gas leases of lands in the Creek Nation had been approved by the department.

69. Removal of Restrictions. As a result of the Act of April 21, 1904, 33 Stat. 189, the restrictions on the sale of lands were removed. One result of this action was that a great many freedmen of the Five Civilized Tribes gave up their lands for often inadequate consideration.

70. Continuation of Leasing. The Interior Department continued to approve oil and gas leases of lands in the Creek Nation subject to restrictions on leasing. In his 1905 report, the Commissioner of Indian Affairs stated that 94 oil and gas leases of Creek lands had been approved by the Department. In his 1906 report, the Commissioner stated that the department had approved 126 oil and gas leeases on Creek lands. Under approved leases, oil development in the Creek Nation progressed rapidly. In his report of July 14, 1906, to the Commissioner of Indian Affairs, the United States Agent for the Union Agency at Muskogee, stated:

> In the rapid development of the resources of the Indian Territory, the rich oil deposits have attracted, from every part of the United States, those interested in the oil industry. This development has been especially active in the Creek and Cherokee nations, and these oil fields, in connection with those adjacent in Kansas and Oklahoma comprise what is known as the 'mid-continent field,' and it has made most remarkable strides in the past year. The larger percentage of the leases have been taken and the greatest development has been in the Cherokee Nation, but of late the fields have moved southward in the Creek Nation very rapidly. (Pl. Ex. 26, at 225-26)

In 1904, further development of oil and gas wells was begun in the Muskogee area, in the eastern portion of the Creek Nation. At this time there were 35 or more producing wells in this area and 50 at Red Fork. Operators from all over the mid-continent region flocked to the new development at Muskogee, and many large companies were represented. The oilmen believed the new development was a forerunner of the opening of another large field in the Creek Nation.

71. Glenn Pool Strike. In November 1904, the first oil well was completed about 14 miles south of Tulsa, in the western portion of the Creek Nation, in what is now Creek County. On November 22, 1904, when this 800-barrel well was developed, "this was the signal for tremendous excitement and from that moment there was one of the greatest struggles for oil leases in the vicinity ever known in the history of the oil business." This discovery opened up the Glenn Pool which yielded substantial production and which was "the greatest strike up to that time in Oklahoma." Glenn Pool attracted oilmen from all over the United States. Its depth was reasonably shallow, the cost of drilling moderate, the oil output was by gas pressure, and the quality of oil was excellent.

72. Quality of Glenn Pool. The Oil Investor's Journal, August 3, 1906, stated with respect to increased oil production in the Mid-Continent region:

> . . . This large augmentation in the gross output is due to the pushing of productive territory steadily southward into Indian Territory where the sands are more prolific than in Kansas. The farther south

operations move the greater becomes the capacity of wells. The Glenn Pool, about fifteen miles southeast of Tulsa, I.T., in the frontier development, is the most remarkable pool yet discovered in the Mid-Continent region. Development is trending to the south and southeast and operators are looking for pools all the way to Texas . . .

* * * * *

. . . The showing of the Glenn Pool has convinced operators to a greater degree than ever before of the possibilities of ultimate extension of proven territory to Texas . . . (Def. Ex. V-12, at 12)

73. Bonus Payments. Large bonuses were paid for oil and gas leases in the Glenn Pool area. The Oil Investors' Journal, August 3, 1906, reported:

. . . Leases have brought from a few dollars to $16,000 a tract. One company early in the game paid $12,000 for a 160-acre farm and fee. It is fine land for farming purposes if it had no oil, but with the present showing it would probably be appraised at pretty near $300,000. (Def. Ex. V-12, at 14)

The Commissioner of Indian Affairs in 1907 reported:

Many Indians who have allotments in the productive fields receive each month royalties in very large amounts, many from $300 to $400 per month, several more than $2,000 and one more than $3,000 per month. In addition to the royalties, lessees offer large bonuses for leases on tracts within the developed oil fields, the largest cash bonus being $43,000, paid for a lease on 20 acres within what

is known as the Glenn Pool; a bonus of $25,000, in addition to a royalty of 12½ percent, was paid for a 160-acre lease on the allotment, also in the Glenn Pool, of Ernest Clayton, a deceased Creek Indian. (Pl. Ex. 26, at 99)

74. Potential Productivity. The Pennsylvanian formation in the Creek Nation had been proven to be a prolific producer of oil and gas. In the May 19, 1907 issue of the Oil Investors' Journal, it is stated:

Professor Charles N. Gould, the geologist at the state university of Oklahoma, Norman, Oklahoma, gives it as his opinion that at the present time not one-third of the future oil field of Oklahoma has been prospected, and not one-tenth of it has been fully developed. He bases his conclusion on the geological structure of the rocks and the conditions under which oil and gas have been found in other parts of the country. Professor Gould has spent several years studying conditions in the oil regions, and has come to the conclusion that the center of future development lies in the region south of the Canadian river. The southern part of the Cherokee and much of the Creek Nations will also probably develop into good territory. There is also a region in west central Arkansas that should prove prolific, according to Professor Gould. 'If these predictions are correct,' Professor Gould states, 'it seems probable that the Mid-Continent field is still in its infancy, and that it will shortly become the most important field in the continent.' (Def. Ex. V-12, at 3)

75. Morris Pool Development. The next development in the Creek Nation was at the town of Morris, in what is now

Okmulgee County, located in the center of the Creek Nation. The Oil Investors' Journal of June 19, 1907, reported:

> There is rich oil territory north of the big pool– and south of it. The Glenn field may come and go as a flowing proposition, but there will still be a world of oil awating the drill. The first part of this month a big well was brought in at Morris, forty miles south of Tulsa, giving evidence of the presence of another pool, those dimensions, however, are yet to be defined. Fifty miles southeast of Tulsa, at Muskogee, a well is flowing 250 barrels of high grade oil. Another year may see a half dozen new fields developed in Indian Territory. (Def. Ex. V-12, at 12)

The Morris pool was near the town of Okmulgee. The Oil Investors' Journal of July 5, 1907, reported:

> . . . All agree on one point: an oil field was never opened in a prettier country than that in which Morris is situated. It is a high, gently rolling prairie, with a number of knobs to the south like those at the south end of the Glenn field. The soil is rich, and most of it is in cultivation, there being many fields of corn, cotton and oats in the neighborhood. The roads are good and it will be easy to move freight from Morris out to the field . . . (Def. Ex. V-12, at 3)

76. Lease Bonuses. At a sale on May 11, 1907, bonuses were paid for oil and gas leases in the Morris field on Creek minor lands for eight 40-acre tracts as follows: $4,500; $3,375; $3,100; $2,700; $2,525; $3,025; $2,500; and $2,000;

or total bonuses for 320 acres of $23,225 or $72.50 an acre. In July 1907, oil and gas leases on two 80-acre tracts were purchased in the Morris field, one for $20,000 and the other for $2,500 cash and part of the oil.

77. Opinion of the Commissioner. In his 1907 report to the Secretary of the Interior, the Commissioner of Indian Affairs, stated:

> . . . The experience since the opening of this territory to white settlement shows most clearly that it is not safe to remove all restrictions. The dealings of the white man in the Indian Territory, in the acquisition of valuable agriculture and oil lands, have shown too many instances of unconscionable greed and dishonesty. The agricultural lands in the Indian Territory are wonderfully fertile, having increased many-fold in value during the past ten years. But, in addition to this, the discovery of the deposits of oil and coal had made certain sections of the country very much more valuable and has tremendously increased the desire of white men to obtain control of those sections. Thus far these oil and coal lands have been handled under a system of leasing controlled by the Interior Department. (Pl. Ex. 27, at 23-24)

With many Indians thereafter able to lease or sell their lands without restrictions, oil development continued to progress rapidly in the Creek Nation.

78. Further Drilling Activities. Preliminary figures published in *The Oil Investors' Journal* of January 18, 1907 (Def. Ex. V-12, at 11) indicate that during the year 1906 there were 2,770 wells drilled in Oklahoma and the Indian Territory of which 2,266 (77%) produced oil and 513 (23%)

were either dry or produced gas. Several years later the Oklahoma Geological Survey in its Bulletin No. 19 (1917) (Pl. Ex. 6) published figures showing the incidence of drilling in Oklahoma. Composite figures for the nine counties which had formerly comprised the Creek Nation are as follows:

Year	Total Wells Drilled	Dry	Gas	Oil
1906	4,819	296(6%)	222(5%)	4,301(89%)
1907	no figures	no figures	no figures	no figures
1908	" "	" "	" "	" "
1909	609	74(12%)	21(4%)	514(84%)
1910	681	98(14%)	19(3%)	564(83%)
1911	511	115(23%)	11(2%)	385(76%)
1912	995	228(23%)	113(11%)	654(66%)
1913	2,227	390(16%)	144(7%)	1,693(77%)
Totals	9,842	1,201(12%)	530(6%)	8,111(82%)

During the year 1912, the Cushing oil field, located in the western part of Creek County, came into production. By 1914, more than 750 wells were completed in this field, thus comprising about nine percent of the total number of wells in Oklahoma. Eighteen of the tracts in this case were located within the Cushing oil field. Over the course of many years after the valuation date, approximately one-half of the tracts involved in this case had producing oil wells on them.

79. Oil Leases on the Subject Tracts. Interest in oil exploration was so high in Oklahoma during the early years of the twentieth century that it was common practice for owners of tracts to lease the oil exploration rights. Of the 142 tracts involved in this case, ten had leases on them by the year 1907; thirty-one more were leased between 1908 and 1910; and sixty-one others were leased by the year

1915. The amounts for which the tracts were leased is not known but evidence in the record indicate that $25.00 per acre was considered to be a fair estimate of the value of an oil lease in the area of the subject tracts at approximately the date of taking (Pl. Ex. 23, at 27).

80. Mineral Values. After analyzing and weighing all the evidence, the Commission has determined that a separate value should be given to the subsurface area of these 142 tracts based upon oil and gas development. The evidence indicates that oil development in the Indian Territory and the Creek Nation began substantially before the valuation date in this case. Furthermore, this development was so widespread that a reasonable purchaser having access to all the information then currently available could reasonably conclude that the opportunity of finding oil and gas within these 142 tracts was more than speculative.

81. Plaintiff's Oil and Gas Appraisal. Josef Faust and John J. Hassler of Oklahoma City, Oklahoma, were selected by the plaintiff to determine the mineral value of these 142 tracts. Dr. Faust valued the oil in these tracts in three ways. The first was the "true value", the second was the "discounted value" of 1907 and the third was the "present worth" as of January 1, 1975. In reaching each of these values, a lease bonus and rental was established based on a fixed value of $10.00 per acre. This figure was the same for each of the valuations. The second factor was the royalty value, and this was fixed at $25.00 per acre and was also the same for each of the three valuations. The third factor was the only varying one, and this was based on production value. The "true value" production value was based on actual production, while the "discounted value" and "present worth" values were made by using computer values based on actual yearly production and government bond interest rates.

On the basis of their research, Faust and Hassler determined that a figure of $10.00 per acre was a fair lease bonus and rental. They likewise concluded that $25.00 was a fair figure to determine royalty value. These figures were based on their determination of fair average value of these lands with regard to each type of valuation being determined. The royalty figure of $25.00 per acre takes into consideration those tracts which had a dry hole drilled, on which no wells had been drilled or on which wells had been drilled but production had ceased. This figure is predicated on their evaluation of the evidence and their experience in the oil business over the years.

The Commission finds that lease bonuses and rentals, with a possible rare exception, were based on leases made after March 4, 1907. The Commission makes the same determination with regard to royalty payments, which are based on production and the production value be it contemporaneous or in the future. In all instances plaintiff's experts' values are based on events which occurred after the taking date of March 4, 1907.

82. Defendant's Oil and Gas Appraisal. Defendant's appraiser, Dr. Murray, determined that the average per acre value of the lands was $15.00 not including any special value attached to specific tracts based on mineral presence. His final average per acre value for all tracts was $21.95. Although not stated, it follows that he determined that the per acre enhancement for all minerals was $6.95 per acre.

In his tract-by-tract valuation, he valued three tracts at more than $50.00 per acre because tracts had oil and gas production very near the taking date. All other tracts were valued a few dollars above or below the $15.00 per acre average. Presumably, valuations above $15.00 reflect enhancement for minerals, although the objective basis for such enhancement is not explained.

83. Valuation of the Oil. The Commission has reviewed all the evidence and weighed the relative merits of the parties' appraisal reports. The Commission finds that the evidence in this case establishes that in 1907 it was common knowledge that oil was present under a significant portion of the Creek Nation but that, at that time, the exact location of the oil was impossible to determine. A knowledgeable purchaser, having full access to the information then available, would have been willing to pay a substantial incremental amount for lands within the Creek Nation based upon the known and potential presence of oil. Based upon the evidence of record we find that a reasonable increment to the value of the subject tracts to reflect the known and potential presence of oil and gas of $550,000.

84. Equalization Money Paid to Erroneous Enrollees. Equalization money was that money paid to enrollees when they were allotted lands and the value of the allotments (as determined by the Dawes Commission valuation procedures) did not reach $1,040.00. These sums were invariably very small amounts. The defendant paid equalization of allotment money from Creek tribal funds to persons erroneously placed upon the tribal rolls of the Creek Nation. The total amount so paid by the defendant was $25,381.55.

85. Total Surface and Mineral Value. The Commission finds that the total fair market value as of March 4, 1907, of the 142 tracts in this case is $1,090,324.65.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Commission concludes as a matter of law that:

1. The agricultural, grazing and townsite lands, totalling 22,737.21 acres, had a fair market value as of March 4, 1907, of $430,324.65.

2. Known and potential coal deposits under these lands increased the fair market value thereof by the amount of $110,000.00.

3. Known and potential oil and gas deposits under these lands increased the fair market value thereof by the amount of $550,000.00.

4. The amount of Creek Tribal funds paid to erroneous allottees was $25,381.55.

5. Plaintiff is entitled to recover from defendant damages in the amount of $1,115,706.20, less allowable offsets, if any.

/s/ Jerome K, Kuykendall,
Jerome K. Kuykendall, Chairman

/s/ John T. Vance
John T. Vance, Commissioner

/s/ Richard W. Yarborough, Commissioner
Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/ Brantley Blue
Brantley Blue, Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION, Plaintiff,	)	
v.	)	Docket No. 169
THE UNITED STATES OF AMERICA, Defendant.	)	

INTERLOCUTORY ORDER

Upon the additional findings of fact numbered 34 through 83, and the accompanying opinion, all of which are hereby made part of this order, the Commission concludes that:

1. The agricultural, grazing and townsite lands, totalling 22,737.21 acres, had a fair market value as of March 4, 1907, of $430,324.65.

2. Known and potential coal deposits under these lands increased the fair market value thereof by the amount of $110,000.00.

3. Known and potential oil and gas deposits under these lands increased the fair market value thereof by the amount of $550,000.00.

4. The amount of Creek Tribal funds paid to erroneous allottees was $25,381.55.

IT IS THEREFORE, ORDERED that Plaintiff shall have and recover from the defendant the amount of $1,115,706.20 less such offsets, if any, as may be allowable under the Indian Claims Commission Act.

Dated at Washington, D.C. this 17th day of February, 1977.

/s/ Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/ John T. Vance
John T. Vance, Commissioner

/s/ Brantley Blue
Brantley Blue, Commissioner

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

APPENDIX E

40 Ind. Cl. Comm. 90

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION, Plaintiff,	)	
v.	)	Docket No. 169
THE UNITED STATES OF AMERICA, Defendant.	)	

FINAL AWARD

UPON CONSIDERATION of the defendant's notice filed on March 22, 1977, that it will not prosecute its claim for offsets herein but that it reserves the right to prosecute such claim in *The Creek Nation v. United States,* Docket 272 and defendant's motion for entry of final award in this case, included in the same filing with the said notice and our interlocutory order herein dated February 17, 1977 which ordered that plaintiff shall have and recover from the defendant the amount of $1,115,706.20 less such offsets, if any, as may be allowable under the Indian Claims Commission Act (39 Ind. Cl. Comm. 383, 434); and the plaintiff having interposed no objection to the said notice or motion;

IT IS THEREFORE ORDERED that the plaintiff shall have and recover from the defendant the sum of $1,115,706.20, which sum shall be in full satisfaction of all of the plaintiff's claims asserted in this case.

Dated at Washington, D.C., this 6th day of April, 1977.

/s/ Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

/s/ John T. Vance,
John T. Vance, Commissioner

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/ Brantley Blue
Brantley Blue, Commissioner

APPENDIX F

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 169

Decided: December 14,1970

Appearances:
Paul M. Niebell,
Attorney for Plaintiff.

James E. Clubb, with whom was
Mr. Assistant Attorney General
Shiro Kashiwa, Attorneys for Defendant

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

The Creek Nation has brought this suit alleging that the defendant is liable to it because the Dawes Commission, acting under certain acts of Congress and agreements entered into between the Creek Nation and the United States, through errors and mistakes, placed approximately 200 persons on the rolls as citizens of the Creek Nation, which persons thereby became wrongfully entitled to share in the property of said Nation. These errors and mistakes are alleged to have arisen through duplicate enrollments of the same person and through enrollment of persons not yet born or already dead as of the respective dates upon which it was necessary, as established by the Congress, to have

been alive in order to be enrolled. Plaintiff asserts that defendant is liable for this alleged loss suffered by the Creek Nation.

The claim is based upon the jurisdictional provisions of section 2, clauses (1) and (5) of the Indian Claims Commission (60 Stat. 1049).

The Creek Nation would have the Commission grant to it, under clause (1) of the Act, the fair market value of the Creek tribal lands allotted to and the Creek tribal funds distributed to the erroneous enrollees on the theory that in equity the decisions of the Dawes Commission in placing erroneous enrollees on the Creek tribal rolls were beyond its jurisdiction and in violation of the provisions of the Creek Agreements and the legislation governing such enrollments, and accordingly may be revised. In the alternative, the plaintiff urges that the defendant is liable under clause (5) of the Act because the United States acted unfairly and dishonorably in placing erroneous enrollees on the Creek tribal rolls.

Jurisdictional Defense

The defendant has again raised the defense that the action entitled *The Creek Nation v. United States*, 92 Ct. Cl. 346, reconsidered and affirmed 93 Ct. Cl. 767, *cert. denied* 314 U.S. 667 (1941), is *res judicata* of the issues raised by this claim. The defendant earlier had filed a motion for summary judgment on this ground which the Commission denied on April 28, 1958. (See 6 Ind. Cl. Comm. 230.)

Subsequently, in *The Creek Nation v. The United States*, 168 Ct. Cl. 483, 495 (1964), an unrelated case, the Court declared that the Indian Claims Commission Act requires the Commission to hear the Indians' claims of unfair and

dishonorable dealings under clause (5) in all instances except: (1) where the facts found in the prior litigation show on their face that the dealings were fair and honorable under the circumstances and no new and substantial factual question on the issue is raised (see *The Creek Nation v. The United States*, 168 Ct. Cl. 512 (1964)); and (2) where the claim based on fair and honorable dealings was recognized by a rule of law or equity in prior litigation and, therefore, clause (5) has no application (see *Blackfeet and Gros Ventre Tribes v. United States*, 127 Ct. Cl. 807, 818; *cert. denied* 348 U.S. 835 (1954)). While claims asserted under clause (5) of section 2 of the Indian Claims Commission Act will seldom be barred under the doctrine of *res judicata*, collateral estoppel may be applicable to bar relitigation of matters and issues actually controverted and decided in an earlier suit between the parties, even though the cause of action may be different. *The Creek Nation v. The United States*, 168 Ct. Cl. 483, 488, 490-91.

We are of the opinion that the prior adjudication of the Court of Claims in the 1941 *Creek* case is not res judicata of the claims raised in the instant case. In the case of the equitable claim under clause (1), the Court of Claims in its original opinion, 92 Ct. Cl. 346, at 351, specifically stated that it had not considered the equitable claim there presented by the Creek Nation because the Court had made no determination as to whether the special jurisdictional act under which the claim was brought had conferred such jurisdiction on the Court. Thus, based upon the Court's own statement, it cannot be said that the Court of Claims could have reached said claim in the prior litigation. In the case of the claim under clause (5), neither necessary criterion set forth by the Court of Claims for the application of the doctrine of *res judicata* is present here. However, the doctrine of collateral estoppel will apply

(as will hereinafter be seen) to bar relitigation of certain issues which were actually reached and passed upon by the Court in the prior *Creek* suit.

Plaintiff's Claim Under Section 2(1) of the Act

The plaintiff's claim under this section is based, first, upon the ground that the Dawes Commission exceeded its jurisdiction in making the erroneous enrollments. Plaintiff argues that, under the Curtis Act (30 Stat. 495), defendant authorized the Dawes Commission to make "correct rolls" of the citizens by blood of the Creek Nation, eliminating from the tribal rolls such names as had been placed thereon by fraud or without authority of law, and to enroll only such citizens as had lawful right thereto and their dependents born after such rolls were made. Plaintiff asserts that it is entitled to recover within the meaning of the Commission's equitable jurisdiction in clause (1) of section 2 of the Indian Claims Commission Act either because the Dawes Commission acted beyond its jurisdiction in making the erroneous enrollments or because mistakes were made in compiling the Creek rolls.

The question of what Congress authorized the defendant's Dawes Commission to do in connection with the enrollment of Creek citizens was actually reached by the Court of Claims in the 1941 litigation between these same parties, 92 Ct. Cl. 346, *supra*, and the Court there passed on the question of the jurisdiction of the Dawes Commission. The doctrine of collateral estoppel is therefore applicable to bar further litigation of this issue. *The Creek Nation v. United States*, 168 Ct. Cl. 483, *supra*.

In the 1941 *Creek* suit in the Court of Claims, the plaintiff alleged that the defendant, in pursuance of its policy of abolishing the Creek tribal government and dividing in severalty among the citizens of the Creek Nation the communal property of the Nation, did, contrary to the terms of certain agreements between plaintiff and defendant and in violation of a certain contract between them, add to the rolls of citizenship of the plaintiff the names of 2,000 persons who were not entitled to share in the property of the Creek Nation, made duplicate and triplicate enrollments of one and the same person, and other errors, and that by reason of the Act as aforesaid by the agents and officers of the defendant the lands, money, and property of the Creek Nation were taken and confiscated by the United States without just compensation or due process of law. The plaintiff asked to recover from defendant full compensation for the lands taken from it, with interest thereon from the date of judgment, and that the defendant be required to account to plaintiff for all money belonging to the Creek Nation paid to persons erroneously enrolled as members of the Creek Nation and for such other and further relief as the Court may deem just and proper.

In the first decision, 92 Ct. Cl. 346, *supra*, the Court of Claims, in sustaining the defendant's demurrer and dismissing the suit held, in part, that as long as the Dawes Commission, without fraud or intentional misconduct, proceeded in accordance with the agreements between the parties, the Commission was acting under the jurisdiction conferred by the agreements and its decrees were final. The Court found that defendant did not agree that the rolls of Creek citizens made up by the Dawes Commission would be absolutely correct. The defendant agreed only to make rolls of Creek citizens and the agreement was "literally complied with."

In the second decision, 93 Ct. Cl. 767, *supra*, the Court of Claims reconsidered its first decision on the basis of an

amended petition submitted by the plaintiff and sustained defendant's demurrer to that petition.

Since this plaintiff has not alleged fraud in its claim under section 2, clause (1) of the Act, the only remaining possible basis for liability on equitable grounds thereunder is that revision of the rolls would be appropriate based upon mistake cognizable in equity. Pliantiff's brief sets forth mistake generally as a ground for recovery under clause (1) based on all the alleged erroneous enrollments.

In *United States v. Bessie Wildcat, et al.*, 244 U.S. 111 (1917), a suit in equity brought by the United States on behalf of the Creek Nation to set aside an allotment to one Barney Thlocco, who had been erroneously enrolled as a Creek citizen despite the fact that he died before April 1, 1899, the Supreme Court, in discussing the Dawes Commission, stated:

> *** There was thus constituted a quasi judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable . . . [p. 118]
>
> A correct conclusion was not necessary to the finality and binding character of its decisions . . . [p. 118]
>
> When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think, it was the intention of the act that the matter, upon the approval of the Secretary should be finally concluded and

> the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake . . . [p. 119]
>
> *** We think the decision of such tribunal, when not impeached for fraud or mistake, conclusive of the question of membership in the tribe, when followed, as was the case here, by the action of the Interior Department confirming the allotment and ordering the patents conveying the lands, which were in fact issued. *** The rule is that such decisions are presumably based upon proper showing, and that they must stand until overcome by full and convincing proof sufficient within the recognized principles of equity jurisprudence in cases of this character to invalidate them. [p. 120]

In *United States v. Minnie Atkins, et al.*, 260 U.S. 220 (1922), another case challenging an enrollment made by the Dawes Commission, the question was whether one Thomas Atkins, a Creek enrollee, ever existed at all. The United States, on behalf of the Creek Nation, sought to strike his name from the rolls alleging that he had never existed and that his enrollment came about through fraud and gross mistake of law and fact. The lower courts had decided that the evidence established Atkins' existence and the Supreme Court affirmed. The Court quoted at length from *Wildcat* and concluded:

> It must be accepted now as finally settled that the enrollment of a member of an Indian tribe by the Dawes Commission, when duly approved,

> amounts to a judgment in an adversary proceeding determining the existence of the individual and his right to membership subject, of course, to impeachment under the well established rules where such judgments are involved. [260 U.S. 220, 225, 226]

In *Tiger, et al. v. Twin State Oil Co.*, 48 F.2d 509 (1931), the Circuit Court of Appeals, Tenth Circuit, relied upon *Wildcat* and *Atkins* to cancel, under its equity powers on the basis of extrinsic mistake, the Creek enrollment of one Do-saw-cher, where the evidence showed that the same person had been enrolled twice (as John Tiger and as Do-saw-cher), that separate allotments had been made under each name, and that the Dawes Commission had acknowledged its mistake and cancelled the allotment to Do-saw-cher before the final closing of the rolls in 1907. The Court, at pages 512-13, stated as follows:

> It is argued that the act of the Dawes Commission in enrolling Do-saw-cher was the determination of a quasi-judicial body that he was entitled to an allotment. This is true. A determination of the Dawes Commission, when acting within its jurisdiction, is subject only "to such attacks as could successfully be made upon judgments of this character for fraud or mistake," and such attacks must be supported by "full and convincing proof." United States v. Wildcat, 244 U.S. 111, 37 S.Ct. 561, 564, 61 L. Ed. 1024; United States v. Atkins, 260 U.S. 220, 43 S.Ct. 78, 67 L. Ed. 224. Reliance is also placed upon United States v. Lena (C.C.A. 3) 261 F. 144, wherein it was held in substance that if a claim was made before the Dawes Commission that a

> duplication existed, and the Commission considered the matter and determined that no duplication in fact existed, that the determination of the Commission cannot be impeached. In the case at bar the Commission did not determine that no duplication existed; on the contrary, when its attention was called to the matter, it found that a duplication did exist, and the record leaves no doubt of the correctness of that finding.

> This court is not only bound by the decisions in the Wildcat and Atkins Cases, but is in thorough accord with the principles there announced. If there is to be any stability to Indian titles, the determination of the Dawes Commission as to matters confided to its jurisdiction cannot be collaterally re-examined on the ground that the Commission made a mistake in its determination. But that is not this case. The Commission in this case determined that the father of the plaintiffs was a member of the Tribe and entitled to an allotment. The mistake was in making two records of the one determination. Within the strict confines of the Wildcat and Atkins Cases, there is ample power in the court to correct this manifest error.

> . . . It is entirely clear that its [Dawes Commission] actions were the result of a mistake; not an intrinsic mistake in the decision of disputed facts or law in a matter presented to and determined by it, as in the Wildcat and Atkins Cases, but a mere clerical oversight in carrying one Indian on the rolls under two names. * * * The duplicate enrollment and allotment was not

an intrinsic mistake in a determination, but an extrinsic mistake in making two records of one determination.

The plaintiff in the instant case has not presented evidence constituting the "full and convincing proof" (see *Wildcat, supra*) which would permit the Commission to determine whether any specific enrollments among the erroneous enrollments fall within the rather narrow confines of *Tiger* or that any such enrollments were the result of so gross a mistake as to warrant equitable relief. However, since the Commission has determined that there is a basis for recovery under clause (5) of the Act, we need not pursue further the matter of mistake.

Plaintiff's Claim Under Section 2(5) of the Act

Proceeding to plaintiff's claim that the United States did not deal fairly and honorably with the Creek Nation in the enrollment of the citizens thereof, plaintiff alleges that a fiduciary relationship existed between the United States and the Creek Nation (*United States v. Creek Nation,* 295 U.S. 103 (1935), and *Seminole Nation v. United States,* 316 U.S. 286 (1942)); that the duty of the United States as guardian of the Creek Nation was the preservation and protection of the Creek Nation's tribal property; that the United States agreed to make "correct rolls" of Creek citizens, "enrolling such only as may have lawful right thereto;" and that the United States failed to perform its obligations, thereby causing the losses of which the plaintiff complains.

Plaintiff further alleges that defendant had knowledge prior to the final closing of the Creek rolls on March 4, 1907, that errors had been made on the rolls of the Creek citizens; that Commissioner Bixby had retained his interest in the Canadian Valley Trust Company; that the Creek rolls

had been carried away from the Commissioner's office, copied, and were in the possession of grafters, and land companies seeking to defraud the Creek allottees; that Mr. Mott had filed charges against Commissioner Bixby; that plaintiff had objected to the change in the manner of delivery of the deeds and plaintiff's reasons for so objecting; and that plaintiff had more than once requested from the Dawes Commission copies of the Creek rolls in order to investigate independently the alleged erroneous enrollments.

Plaintiff asserts that defendant should have, in view of its knowledge of said errors and abuses, accepted plaintiff's offers to assist in purging the rolls before they were finally closed, since the errors would thereby have been eliminated. This pattern of behavior, claims plaintiff, resulted in failure on the part of defendant to fulfill its obligations to plaintiff and constituted unfair and dishonorable dealings towards the Creek Nation on the part of the United States.

Section 2(5) of the Indian Claims Commission Act extends to "extra-legal or moral claims of Indians against the United States . . ." *Otoe & Missouria Tribe v. United States,* 131 Ct. Cl. 593, 621, 131 F. Supp. 265, 283, *cert. denied* 350 U.S. 848 (1955).

The United States may be held liable under the "fair and honorable dealings" clause in instances where "by its own acts, it had undertaken special duties which it has failed to fulfill." It is essential, therefore, "to determine if a special relationship was created; the nature and scope of any responsibilities assumed by the United States; and whether the Federal Government met these obligations." *The Lipan Apache Tribe, et al. v. United States,* 180 Ct. Cl. 487/502 (1967).

The Court of Claims stated in *Oneida Tribe of Indians*

of Wisconsin v. United States, 165 Ct. Cl. 487, 494, *cert. denied* 379 U.S. 946 (1964) that if a duty is found to exist:

> It is unimportant . . . to characterize that obligation precisely. Whether the responsibility be termed that of a guardian, a fiduciary, a trustee, a protector, or of a superior sovereign to a dependent people, the duty of care imposed upon the defendant would be the same. It would not reach the insurer's level nor fall to that of an outsider. The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration. The real question is: Did the Federal Government do whatever it was required to do, in the circumstances . . . That is the standard.

It has been held in several instances that by virtue of the Curtis Act and subsequent agreements with the Five Civilized Tribes, the United States practically assumed full administrative control, custody and management over the property and affairs of the Five Civilized Tribes. *Hitchcock v. United States,* 187 U.S. 294 (1902); *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); *United States v. Creek Nation,* 295 U.S. 103 (1935); *Creek Nation v. United States,* 318 U.S. 629 (1943). This Commission has held, in similar circumstances, that:

> The Government thereby assumed direct control over the property of the Indians, not for its own direct benefit, but for the benefit of the owners [i.e. the tribe], to liquidate and otherwise distribute same. Defendant thereby assumed such powers and functions, and we think, duties and obligations over the petitioner and its property as to become in the nature of a trustee for liquidation purposes

> . . . (*The Chickasaw Nation of Indians v. United States,* 7 Ind. Cl. Comm. 64, 89 (1959)).

The Commission has found, after careful consideration of the historical events, including the relevant legislation and the agreements between the Creek Nation and the United States, that the United States did undertake the duty of protecting the plaintiff's rights to its property incident to the enrollment of Creek citizens and the allotment in severalty of the Tribe's communal lands to those so enrolled.

In *The Snake or Piute Indians, etc. v. United States,* 125 Ct. Cl. 241 (1953), the Court of Claims stated, at 255:

> [A] finding respecting fair and honorable dealings is . . . clearly in the nature of an inference to be drawn from all the relevant evidentiary or basic facts bearing on the entire course of dealings between the parties . . . That something or someone is or is not fair or honorable is always a conclusion or an inference based upon many factual considerations. It is seldom that in a course of dealings over a long period of years, a single event will be determinative of whether, in the last analysis, a person has or has not acted fairly and honorably.

The Commission has noted the complexity of the task delegated to the Dawes Commission of dividing in severalty the tribal lands of the Five Civilized Tribes. The evidence shows that the Dawes Commission considered the applications of approximately 250,000 persons for enrollment as citizens of the Five Civilized Tribes and that it enrolled and made allotments to approximately 101,000 of these. The Dawes Commission heard 10,952 allotment contests among the Five Civilized Tribes and accumulated voluminous records of these proceedings. (Findings of Fact No. 28) In the Creek Na-

tion, 21,381 persons had sought enrollment, of whom 18,698 were enrolled and 2,683 were denied enrollment. (Finding of Fact No. 27)

It must be borne in mind, however, that the United States, once having decided upon and having begun to implement the dissolution of the Creek Nation became "in the nature of a trustee for liquidation purposes" with respect to the land of the Creek Nation. See *The Chickasaw Nation of Indians v. United States, supra.* The United States assumed the task of terminating the Nation's mode of life including its manner of holding its lands. In these circumstances and when placed within the framework of the "fair and honorable dealings" clause of the Indian Claims Commission Act, it was incumbent upon the United States to take every conceivable precaution to insure that the Creek Nation did not suffer the loss of any of its lands. Apparently in an attempt to hasten the process of enrollment and allotment in order to satisfy the large white population then residing within the Creek Nation, the United States, in effect, chose to refuse to the Creek Nation the opportunity to investigate independently those persons enrolled by the Dawes Commission. This was accomplished by failing to give the Nation copies of the approved rolls before the rolls became final and after which time the right of appeal granted by the Act of June 10, 1896, 29 Stat. 321, 339-340, became meaningless. The evidence clearly shows that the United States had knowledge of the allegations raised by the Creek Nation of errors and even fraud in the enrollment process. The Government knew that the Creek rolls had been stolen from the Commissioner's office and copied; it knew that 46 erroneous enrollees had been stricken from the rolls during the 1904 and 1905 fiscal years based on evidence supplied by the Creek Nation; it knew that Mr. Mott had filed charges against Tams Bixby three months

before the date of final closing of the rolls and that the Attorney General had recommended investigation of these charges; and it knew that the Creek Nation was seeking copies of the approved rolls in order to purge any more erroneous enrollees. And yet the United States, despite this knowledge, chose early finality over later certainty when such certainty was possible given time to investigate. This in the opinion of the Commission was neither fair nor honorable to the Creek Nation.

It is the decision of the Commission, therefore, that in the course of its dealings with the Creek Nation during the enrollment period, the United States acted unfairly and dishonorably towards said Nation in breach of Section 2(5) of the Indian Claims Commission Act. This case will now proceed to a determination of damages, if any, suffered by the Creek Nation by reason of the failure of the United States to act fairly and honorably towards the Creek Nation.

/s/ Brantley Blue
Brantley Blue, Commissioner

Concurring:

/s/ Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

/s/ John T. Vance
John T. Vance, Commissioner

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

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BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION, Plaintiff,	)	
v.	)	Docket No. 169
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: December 14, 1970

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Plaintiff is a tribe of American Indians, residing within the territorial limits of the United States.

2. By the Treaty of March 24, 1832 (7 Stat. 366), the Creek Nation ceded to the United States all its lands east of the Mississippi River and agreed to remove to lands set aside for it by the United States west of the Mississippi River.

3. The United States and the Creek Nation concluded a treaty on February 14, 1833 (7 Stat. 417). By this treaty the United States agreed to grant in fee simple to the Creek Nation certain described lands in what was then Indian Territory but which subsequently became a part of the State of Oklahoma. Pursuant to the treaty provisions, letters patent were issued to the Creek Nation on August 11, 1852, to the tract of land described in Article II of the treaty.

4. In Article IV of the Treaty of August 7, 1856 (11 Stat. 699), the United States solemnly agreed and bound themselves that no State or Territory would ever pass laws

for the government of the Creek Nation, and that no portion of the lands of the Creek Nation would ever be embraced or included within, or annexed to, any Territory or State, nor "erected" into a Territory without the full and free consent of the legislative authority of the Creek Nation.

In Article XV of the same treaty, the United States promised as follows:

> So far as may be compatible with the Constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks . . . shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their . . . limits; excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of . . . the Creek . . . tribe; and all persons not being members of [the] tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents . . .; (assisted, if necessary, by the military) . . . .

5. The Creek Nation thereafter resided on these lands. The Nation maintained a tribal organization consisting of the Executive or Principal Chief, a legislature, a system of courts, and a constitution or code of written laws, whereby the affairs of the Creek Nation and of its citizens were administered. Citizenship in the Nation was evidenced by certain documents known as the Town Rolls which were kept by the duly constituted authorities of the Nation.

6. In 1890, the Creek Nation assembled a census roll of the citizens of the Nation. This census roll was adopted as

a correct census by the National Council of the Creek Nation, and was sent to the Secretary of the Interior as a "correct enumeration of the persons entitled to participate in the payment of the Four Hundred Thousand Dollars appropriated by . . . Act of Congress . . . to be paid to the Creek Indians per capita as provided in . . . the treaty [of June 14, 1866, 14 Stat. 785]."

7. In 1893, the United States discontinued its policy of isolating the Creek Nation and the other of the Five Civilized Tribes in Indian Territory, and by Act of March 3, 1893 (27 Stat. 612, 645), Congress provided that the President would appoint three commissioners to negotiate with the Five Civilized Tribes towards the cession to the United States or the allotment in severalty of the tribal lands of said Tribes for the ultimate purpose of creating a state or states out of the Indian Territory. The commission thus established was originally known as the Dawes Commission, and subsequently as the Commission to the Five Civilized Tribes.

8. On May 17, 1895, the National Council of the Creek Nation directed a committee of eighteen of its members to examine and correct the forty-seven Town Rolls of the Creek Nation. On June 8, 1895, the Committee reported to the National Council that it had examined the Town Rolls and had stricken 619 names from the rolls, leaving an aggregate of 13,841 names thereon. This census roll was approved by the National Council of the Creek Nation in 1896 and was the last authenticated roll of Creek citizens assembled by the Creek Nation.

9. By Act of June 10, 1896 (29 Stat. 321, 339-340), the duties of the Dawes Commission were extended to include the determination of claims of citizenship in the several tribes and the preparation of tribal rolls. The Commission was empowered to conduct hearings and Congress provided that any

tribe or person aggrieved by a decision of the Commission could appeal to the United States District Court.

10. By the Act approved June 7, 1897 (30 Stat. 62, 84), Congress made minor modifications in the functions of the Commission and provided certain procedures to help prevent improper enrollments.

11. The Creek Nation was opposed to the division of its land in severalty and was reluctant to turn over its tribal rolls to the Dawes Commission. Since the Commission was unable, prior to 1898, to secure from the Creek Nation its authenticated tribal rolls, little work was done on Creek enrollment matters under the Acts of June 10, 1896, and June 7, 1897. However, a census was taken without the benefit of the Creek tribal rolls, beginning in the fall of 1897. This census was not intended as a Creek citizenship roll but was later used to assist the Commission in making the roll of Creek citizens.

12. The Dawes Commission, pursuant to the authority vested in it under the Act of March 3, 1893 (27 Stat. 612, 645), reached an agreement with representatives of the Creek Nation on September 27, 1897, relating to the allotment of the lands of the Creek Nation. But the agreement was rejected by resolution of the National Council of the Creek Nation on October 18, 1897, and ratification was also rejected at an election in the Creek Nation on November 1, 1898. The reasons given by Isparhecher, who was then Principal Chief of the Creek Nation, for this rejection are set forth in his report to the National Council of the Muskogee Nation dated October 8, 1897, in which he stated in part:

> I am aware that the United States is urging us to change our relations with her, and has expended

considerable money in surveying our country and for maintaining a Commission for the past three years. But all this had been done at the option of the Government, and not at our request. We have not asked for any of these things, but they have been asked for by the yelping, insatiable boomers who are always on the trail of the Indian, and will be until every foot of this land is opened up; and when we make this treaty, these will be the people that will first throng this country to scheme us out of our homes. (Defendant's Exhibit No. 4, Annual Report of the Department of Interior, House of Representatives Document No. 5, 55th Cong., 2d Sess., p. CXXXVII)

13. Because of the rejection by the Creek Nation and rejections of similar agreements by other of the Five Civilized Tribes, Congress, on June 28, 1898, enacted the Curtis Act (30 Stat. 495) which dispensed with the policy of negotiation with the Five Civilized Tribes set forth in the Act of March 3, 1893 (Finding 7, *supra*). Under the Curtis Act, the Dawes Commission was, insofar as here pertinent, authorized and directed to make correct rolls of the citizens by blood of the Creek Nation, eliminating from the tribal rolls such names as had been placed thereon by fraud or without authority of law, and to enroll only such citizens as had lawful right thereto and their dependents born after such rolls were made. The Act also directed the Commission to make a roll of the Creek Freedmen. The Commission was authorized to make the rolls descriptive of the persons thereon for purposes of identification and to take a census of each of the tribes. The Commission was given access to all rolls and records of the tribes and was given authority to require all citizens of the tribes and persons who should be enrolled to appear before it. The Act further provided that the rolls

so prepared would be final when approved by the Secretary of the Interior.

14. Dissatisfied with prospective allotment under the provisions of the Curtis Act, representatives of the Creek Nation executed an agreement, known as the Original Creek Agreement, with members of the Dawes Commission at Washington, D.C. on March 8, 1900. This Agreement was ratified by Act of March 1, 1901 (31 Stat. 861), and by the National Council of the Creek Nation on May 25, 1901. It authorized the Commission to allot one hundred and sixty acres of Creek National domain to each enrolled member of the Creek Nation, such allotments to be valued at six dollars and fifty cents an acre, and equalized, at that standard value, to $1,040.00. It further provided for the enrollment of all citizens of the Creek Nation entitled to be enrolled under the provisions of section 21 of the Curtis Act (30 Stat. 495) who were living on April 1, 1899, and for the enrollment of all children born to citizens so entitled to enrollment, up to and including July 1, 1900, and then living. It was further provided that no person was to be added to the rolls after March 1, 1901. Under section 23 of the Agreement, the Secretary of the Interior was authorized to furnish the principal chief of the Creek Nation with blank deeds, and the principal chief was to execute and deliver to each allottee a deed conveying all right, title and interest of the Creek Nation and of all other Creek citizens in and to the lands so allotted.

15. In December 1901, the National Council of the Creek Nation passed a resolution requesting of the Dawes Commission a partial list of the Creek citizenship roll being prepared by the Commission in order to assist the Council in establishing that certain enrollments by the Commission had been obtained by fraud and without authority of law. This resolution was sent to the Secretary of the Interior who sent

it to the Dawes Commission for consideration and an immediate report. On January 28, 1902, the Commission recommended to the Secretary of the Interior that the request be denied stating that "approval of said resolution would not only countenance an unjustifiable delay in closing the Creek rolls but would, also, give encouragement to those parties who, because of personal interests, have embraced every opportunity to retard the work of allotment." The request of the Creek Nation was denied. (Defendant's Exhibit No. 16 from the National Archives Record Group No. 48)

16. By the Act approved May 27, 1902 (32 Stat. 245, 258), it was provided "[t]hat all children born to duly enrolled and recognized citizens of the Creek Nation up to and including the twenty-fifth day of May, nineteen hundred and one, and then living, shall be added to the rolls of citizenship of said nation . . . ."

17. The Supplemental Creek Agreement, approved by Act of June 30, 1902 (32 Stat. 500), and ratified by the National Council of the Creek Nation on July 26, 1902, provided that certain children born subsequent to July 1, 1900, should be enrolled as citizens of the Creek Nation.

18. After the enactment of the Curtis Act, the Dawes Commission began the work of making rolls of the Creek Nation. During the course of the enrollment of citizens of the Creek Nation, the Commission utilized the census rolls obtained from the Creek Nation under the authority of the Curtis Act. The Commission examined claimants for citizenship at the general office of the Commission in Muskogee, Creek Nation, and also at interviews held at various places throughout the Creek Nation. While the great majority of the applicants for enrollment appeared personally before the Dawes Commission, there were many cases where enrollment was granted based upon the oral statements of

third parties that a person was alive and entitled to enrollment.

19. In 1903, Messrs. Charles J. Bonaparte and Clinton Rogers Woodruff were appointed special inspectors by the Secretary of the Interior to report on alleged abuses and irregularities in the public service of the Indian Territory. This investigation was ordered because of the report of Mr. S. M. Brosius, Agent of the Indian Rights Association, an organization of private citizens, wherein Mr. Brosius made accusations of grave irregularities on the part of United States Government officials, including members of the Dawes Commission, in Indian Territory. The investigators found that "abuses have been very serious" in the activities of the land and trust companies in leasing Creek lands. The report by Bonaparte and Woodruff further confirmed the fact that officials of the Dawes Commission and some of its employees had organized and were officers and stockholders of companies dealing in Creek lands and that these facts were admitted by said officials. The latter report stated:

> *** We find that Commissioner Bixby's notorious interest in the Canadian Valley Trust Company; the fact that, as stated by Mr. Brosius, two former employees of the Commission are now the principal officers of this corporation, and its occupancy of offices recently forming part of those of the Commission, undoubtedly tend to identify, in some sort, the company with the Commission, and to give the former a quasi-official status, which it is not entitled, and which may possibly afford it an illegitimate advantage in dealing with ignorant or otherwise incompetent persons. We are not to be understood as asserting that the company has been, in fact, dishonest or oppressive in its deal-

> ings; no evidence was produced before us tending to prove or suggest that it had been; but, after a careful consideration of all the circumstances, and in view of the very peculiar conditions now existing in the Territory, we find and report that, in our judgment, Commissioner Bixby's connection with this corporation impairs his usefulness as a public official, and, if he is to retain his present position, it should, in our judgment, be terminated without delay. (Defendant's Exhibit 19, Alleged Abuses and Irregularities in the Public Service of the Indian Territory, Senate Document No. 189, 58th Cong., 2d Sess., p. 22)

The report further stated, in connection with the leasing of allotted lands, that:

> . . . we find some reason to suspect, without however, any definite proof on the subject, that the confidence unavoidably reposed by ignorant and stupid Indians in minor officials may have been occasionally abused . . . There is not, however, the slightest proof that the Commission encouraged or tolerated any such practices. (Ibid, p. 13)

20. In consequence of this investigation, the Secretary of the Interior advised the Dawes Commission that each of its employees had to cease all connection with corporations,, firms or persons engaged in the purchase or sale of town lots or the leasing of lands in the Indian Territory.

21. On December 5, 1904, Mr. M.L. Mott, National Attorney for the Creek Nation, wrote as follows to the Secretary of the Interior:

> **The [Creek National] council of 1903 appropriated one thousand dollars to pay witnesses' per diem and mileage in the matter of investigation of fraudulent enrollments. Very little was done in this connection up to the time of my appointment as National Attorney. Upon final closing of applications for citizenship, September 1st, 1904, I found time to begin the investigation of those cases where citizenship had been established through fraud of the applicant by false swearing, etc. The limited time I had to give to it, before meeting of the council, demonstrated beyond all question that several hundred had succeeded in imposing upon the Daws' [sic] Commission and the Department in getting themselves upon the rolls by these fraudulent methods. I found that the crime of subordination [sic] of perjury had been carried on to considerable extent, and that the applicant's inducement to his witnesses was a division of the allotment in the event he succeeded in getting upon the rolls . . . . The investigation consists in the making of affidavits by two or more witnesses, setting out that the party enrolled is known to the affiants and that they know said affiant is not entitled to citizenship, setting out the different reasons for such knowledge on part of the affiant. These affidavits are forwarded to the Secretary of the Interior accompanied by application of National Attorney, that the Secretary direct the Daws' [sic] Commission to reopen the case for introduction of new and additional testimony, and if upon the rehearing the Secretary of the Interior is satisfied that a fraud was originally perpetrated by the applicant, then he directs the name stricken from the**

rolls. Application has been made to the Secretary and granted for the re-opening of twenty or more cases, and this appropriation is to be used for the payment of the per diem and mileage of each witness as the Nation may present in its behalf. The council appropriated five thousand dollars for this purpose which they hope may have your and the President's approval. I am sure that with vigilant work and a judicious expenditure of this money, a great number of imposters can be fixed upon and the rolls purged of their names. *** (Plaintiff's Exhibit No. 1, pp. 42-43, from The National Archives, Record Group No. 123)

22. During the fiscal years 1904 and 1905, 46 persons previously enrolled as citizens of the Creek Nation, and their enrollment approved by the Secretary of the Interior, were cancelled from the final roll. Evidence had been submitted by the Creek Nation to the Dawes Commission and report made to the Department of the Interior that they were not entitled to have their names appear thereon or that they were duplicated on the roll under other names.

23. By the Act of March 3, 1905, 33 Stat. 1048, 1060, the Secretary of the Interior was directed to complete the work of the Commission to the Five Civilized Tribes (the Dawes Commission). Said Act provided, in part as follows:,

> For the completion of the work heretofore required by law to be done by the Commission to the Five Civilized Tribes, and the provisions for investigations herein contained two hundred thousand dollars. Said appropriation to be disbursed under the direction of the Secretary of the Interior: *Provided,* That the work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior, and that all the powers heretofore granted to the said Commission to the Five Civilized Tribes are hereby conferred upon the said Secretary on and after the first of July, nineteen hundred and five.

In accordance with the provisions of the above Act, the Secretary of the Interior appointed Tams Bixby, formerly the Chairman of the Commission to the Five Civilized Tribes, as his representative to succeed the Commission and to perform the work formerly required of it. Mr. Bixby was thereafter designated "Commissioner to the Five Civilized Tribes."

24. In April 1906, an employee of Commissioner Bixby withdrew the Creek rolls from the Commissioner's office and the employee and another person copied them in a vacant building in the outskirts of Muskogee. The United States Attorney for the Indian Territory sought an indictment for malfeasance in office but the grand jury did not return an indictment. These rolls soon after were in the hands of the land companies doing business in the territory comprising the Creek Nation.

25. On April 24, 1906, Commissioner Bixby advised the Secretary of the Interior of pending legislation having for its purpose changing the method of delivery of deeds to allottees of the Five Civilized Tribes. This legislation provided that all deeds to allottees were to be recorded in the office of the Commissioner to the Five Civilized Tribes, that when so recorded legal title would vest in the allottees, and the deeds would then be delivered under the direction of the Secretary of the Interior to the parties entitled to receive them. In his letter to the Secretary, Commissioner

Bixby proposed that as soon as the legislation was approved by the President, public notice be given "that deeds and patents will be delivered to the persons entitled to receive the same, either in person at the general office of the Commission to the Five Civilized Tribes at Muskogee, Indian Territory, or upon written request therefor, such deeds or patents will be delivered by registered mail". The proposed legislation became section 5 of the Act of April 26, 1906 (34 Stat. 137).

26. The Principal Chief and the National Council of the Creek Nation vigorously objected to this legislation which changed the manner of delivery of deeds, as a violation of section 23 of the Original Creek Agreement. In a letter dated January 24, 1907, from Mr. M. L. Mott, National Attorney of the Creek Nation, to the Secretary of the Interior, Mr. Mott asserted that if Commissioner Bixby were to assume the responsibility for delivery of the deeds, the deeds would be delivered improperly. On January 30, 1907, the Secretary of the Interior denied the request of the Creek Nation.

27. On November 15, 1906, the United States Inspector for Indian Territory transmitted to the Secretary of the Interior a resolution of the National Council of the Creek Nation, requesting that the Creek Nation be furnished a copy of the roll of approved Creek citizens in order that the Creek Nation might "assist and aid in every way possible" in determining "who are and who are not legally and equitably entitled to citizenship in said Nation."

On December 13, 1906, the Acting Commissioner of Indian Affairs denied the request of the Creek Nation for a copy of the approved Creek roll, stating in part:

> The resolution enclosed does not seem to require executive action, and this Office knows of

> no good reason why the Chief, National Attorney, and "each Town King" of the Creek Nation should be furnished with a copy of the approved roll of citizens of the Creek Nation.
>
> The headquarters of the Commissioner are at Muskogee, Indian Territory, where the Chief and National Attorney resides, and no doubt they are at liberty at any time to examine the rolls on file with the Commissioner, in regard to any person they believe to have been enrolled without authority of law, and it is recommended that the Commissioner be not authorized to furnish the Chief, National Attorney and "Town Kings" with copies of the roll but that he be requested to advise the Chief and National Attorney that they may examine the roll on file in his office whenever they so desire, with reference to any person whom they believe has been unlawfully enrolled. (Plaintiff's Exhibit No. 1, p. 96, from the National Archives, Record Group No. 123)

28. In December 1906, Mr. M. L. Mott, the National Attorney for the Creek Nation, filed specifications of charges against Commissioner Bixby before the Secretary of the Interior through the Commissioner of Indian Affairs.

Mr. Mott charged, in part, that Commissioner Bixby was still interested in the Canadian Valley Trust Company and other companies dealing in Indian lands, and that this was generally known among business and professional circles in Indian Territory; that these companies had access at all times to the data disclosed by the Creek rolls, and had used this information to great advantage in acquiring large holdings of Creek lands; that the change in

the manner of delivering deeds to Creek allottees, and the vesting of title upon the recording of the deeds in the Commissioner's office, without delivery of the deeds, afforded great opportunities for fraud and overreaching in acquiring Creek lands; and that Commissioner Bixby had repeatedly refused to give to the Creek Nation a copy of the roll of Creek citizens although he knew that copies of such rolls were then in the hands of certain land-buying companies in the Territory.

On January 29, 1907, the Attorney General of the United States recommended that certain of these charges be investigated and developed. However, on June 30, 1907, Mr. Bixby resigned his position as Commissioner to the Five Civilized Tribes and it does not appear that any further action was taken with regard to these charges.

29. Under the Act of April 26, 1906 (34 Stat. 137), the Creek tribal rolls became final on March 4, 1907, without the Creek Nation ever having been given copies.

30. The Commissioner to the Five Civilized Tribes (Commissioner Bixby's successor), in his Report to the Secretary of the Interior for the fiscal year ended June 30, 1907, submitted a final report on the status of the enrollment work in the Creek Nation. He reported that of the 21,381 Creeks (including Freedmen) who had sought enrollment, 18,698 have been enrolled and 2,683 have been denied enrollment. He reported further that, as of June 30, 1907, a total of 102 persons previously enrolled as Creek citizens had been stricken from the rolls.

31. The Commissioner to the Five Civilized Tribes reported to the Secretary of the Interior in 1914 that the Commission had, since its inception, considered the applications of approximately 250,000 persons for enrollment as citizens of the Five Civilized Tribes and had enrolled

101,209 of these. It had heard 10,952 allotment contests and had accumulated voluminous records of these hearings. The Commissioner further reported that the work of the Commission "had been more complicated than any other work connected with the Indian Service in the history of the Government."

32. Copies of the approved Creek rolls, with notations thereon, establish that erroneous enrollees were included on said rolls as of March 4, 1907, the date said rolls became final.

33. It is established by the record that the defendant acted unfairly and dishonorably toward the Creek Nation in refusing to give the Creek Nation copies of the approved Creek rolls during the enrollment period and, further, having knowledge of the conditions existing in the Creek Nation during the period of enrollment and allotment, in not taking other precautions, reasonable in light of its duty to the Creek Nation, to prevent erroneous enrollments.

/s/ Jerome K. Kuykendall, Chairman
Jerome K. Kuykendall, Chairman

/s/ John T. Vance
John T. Vance, Commissioner

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/ Brantley Blue
Brantley Blue, Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,	)	
	)	
Plaintiff,	)	
v.	)	Docket No. 169
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

INTERLOCUTORY ORDER

Upon the findings of fact and opinion this day filed herein and which are hereby made a part of this order, the Commission concludes as a matter of law that:

1. The plaintiff herein has the legal capacity to bring this suit under section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049).

2. It is established by the record that the defendant acted unfairly and dishonorably toward the Creek Nation in refusing to give the Creek Nation copies of the approved Creek rolls during the enrollment period and, further, having knowledge of the conditions existing in the Creek Nation during the period of enrollment and allotment, in not taking other precautions, reasonable in light of its duty to the Creek Nation, to prevent erroneous enrollments.

IT IS THEREFORE ORDERED that the case proceed to a determination of the damages, if any, suffered by the Creek Nation by reason of the defendant's failure to act fairly and honorably towards the Creek Nation.

Dated at Washington, D.C., this 14th day of December, 1970.

/s/ Jerome K. Kuykendall, Chairman
Jerome K. Kuykendall, Chairman

/s/ John T. Vance
John T. Vance, Commissioner

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/ Brantley Blue
Brantley Blue, Commissioner

APPENDIX G

Section 2 of the Indian Claims Commission Act, approved August 13, 1946, c. 959, 60 Stat. 1049, 1050, (25 U.S.C. 70a), provides in pertinent part as follows:

> "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable groups of American Indians residing within the territorial limits of the United States or Alaska: * * * and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. * * *"

Section 20(b) of said Indian Claims Commission Act, 60 Stat. 1054, (25 U.S.C. 70s(b), provides in pertinent part as follows:

> "* * * At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. * * * On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the

> Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

Section 20(c) of said Indian Claims Commission Act, 60 Stat. 1054 (25 U.S.C. 70s(c)) provides:

> "(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28."

APPENDIX H

PUBLIC LAW 94–465—OCT. 8, 1976
90 Stat. 1990

An Act

To authorize appropriations for the Indian Claims Commission for fiscal year 1977, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is authorized to be appropriated to carry out the provisions of the Indian Claims Commission Act (25 U.S.C. 70), during fiscal year 1977, not to exceed $1,650,000.

SEC. 2. Section 23 of the Act entitled "An Act to create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes", approved August 13, 1946 (60 Stat. 1049, 1055), as amended (86 Stat. 115; 25 U.S.C. 70v), is hereby amended by striking said section and inserting in lieu thereof the following:

"DISSOLUTION OF THE COMMISSION AND DISPOSITION OF PENDING CLAIMS

"SEC. 23. The existence of the Commission shall terminate at the end of fiscal year 1978 on September 30, 1978, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. Upon its dissolution, the records and files of the Commission in all cases in which a final determination has been entered shall be delivered to the Archivist of the United States. No later than December 31, 1976, the Indian Claims Commission may certify and transfer to the Court of Claims all cases which the Commission determines it cannot completely adjudicate by September 30, 1978. In addition, the Commission may, at any time prior to September 30, 1978, certify and transfer to the Court of Claims any case which it determines cannot be completely adjudicated prior to the dissolution of the Commission. Jurisdiction is hereby conferred upon the Court of Claims to adjudicate all such cases under the provisions of section 2 of the Indian Claims Commission Act: *Provided*, That section 2 of said Act shall not apply to any cases filed originally in the Court of Claims under section 1505 of title 28, United States Code. Upon dissolution of the Commission, all pending cases including those on appeal shall be transferred to the Court of Claims for adjudication on the same basis as those authorized to be transferred by this section.".

* * *

APPENDIX I

Extract from Original Creek Agreement, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861, 862, 864, 870:

"3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land – boundaries to conform to the Government survey – which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands, which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed."

* * * *

"9. When allotment of one hundred and sixty acres has been made to each citizen, the residue of lands, not herein reserved or otherwise disposed of, and all the funds arising under this agreement shall be used for the purpose of equalizing allotments, and if the same be insufficient therefor, the deficiency shall be supplied out of any other funds of the tribe, so that the allotments of all citizens may be made equal in

value, as nearly as may be, in manner herein provided."

* * * *

"28. * * *

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

Section 21 of the Act of June 28, 1898, c. 517, 30 Stat. 495, 502-503, provided in pertinent part:

"Sec. 21. * * *

"Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other nations" [Creek] "eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such as may have lawful right thereto, and their descendants born since such rolls were made, * * *."

* * * *

"Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver

same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

Section 2 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 138, provided in pertinent part as follows:

"* * * That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date; * * *"

APPENDIX J

37 Ind. Cl. Comm. 499 499

BEFORE THE INDIAN CLAIMS COMMISSION

THE SEMINOLE NATION, Plaintiff,	)	
v.	)	Docket No. 247
THE UNITED STATES OF AMERICA, Defendant.	)	

ORDER RESCINDING PRIOR ORDER AND FOR OTHER PURPOSES

WHEREAS THE COMMISSION, on January 28, 1976, after consideration of plaintiff's motion of February 14, 1975, requesting the Commission to determine the dates as of which the station reservations involved herein should be valued, and the measure of damages to be awarded herein, defendant's response to said motion, filed April 22, 1975, plaintiff's reply, filed May 12, 1975, and the oral argument on said motion held before the Commission on January 9, 1976, entered an order determining the valuation date and for other purposes (37 Ind. Cl. Comm. 203) in which order the Commission defined the issues raised by plaintiff's said motion to be: (1) the meaning of the term "municipality" as used in section 14 of the Act of April 26, 1906, 34 Stat. 137, 142, for the purpose of identifying those station reservations title to which, pursuant to said act, vested in municipalities rather than adjoining allottees; (2) the date as of which each such station reservation is to be valued; and (3) the measure of damages; and

WHEREAS the defendant, on February 20, 1976, filed a motion for rehearing and clarification of said order, and the plaintiff, on February 26, 1976, filed objections to said motion; and further,

WHEREAS the Commission, upon consideration of defendant's motion for rehearing and clarification has concluded that its order of January 28, 1976, should be clarified in certain respects in order to provide the parties and their counsel with the fullest possible guidance in connection with their preparations for the valuation phase of proceedings hereunder, and that this purpose can best be accomplished by rescission of the Commission's order of January 28, 1976, and restatement and amplification of the Commission's conclusions with respect to the issues, described above, presented by the plaintiff's above-described motion of February 14, 1975;

IT IS THEREFORE ORDERED that the Commission's above-described order of January 28, 1976, be, and the same hereby is, rescinded in its entirety.

FURTHER, the conclusions of the Commission with respect to the issues raised by plaintiff's said motion of February 14, 1975, are that:

1. The term "municipality" as used in section 14 of the Act of April 26, 1906, *supra,* means, for purposes of identifying the station reservations to be valued herein, a town or city incorporated or attempted to be incorporated before November 16, 1907, in the Indian Territory under the organic law of Arkansas which was validated as an existing town or city upon statehood by Article XVIII, § 2, and Schedule § 10, of the Constitution of the State of Oklahoma, and a town or city incorporated or attempted in good faith to be incorporated between November 16,

1907, and June 30, 1909, under Article XVIII, § 1, of the Constitution of the State of Oklahoma and the laws enacted pursuant thereto, which during said period of time exercised authority as a municipal corporation. *See Town of Maysville, Oklahoma v. Magnolia Petroleum Co.,* 272 F. 2d 806 (10 Cir. 1959).

2. The fair market value of the station reservation lands, of the plaintiff's interests in said station reservation lands, and of any encumbrances upon said lands in the form of easements for right-of-way purposes, shall be determined as of June 30, 1909, with respect to each station reservation which on said date was situated within a municipality as defined above. June 30, 1909, was the date on which title to each said station reservation vested in a municipality. *See* Commission Exhibit No. 1, *infra.* As part of the Commission's decisions in the valuation phase of this docket, there shall be determined the effect, if any, upon the fair market value of the plaintiff's interests in the station reservation lands of any then-existing encumbrances upon said lands in the form of easements for right-of-way purposes. It will be appropriate for the parties to put in issue at the valuation trial all such matters which they believe affect the fair market value, on June 30, 1909, of the plaintiff's interest in the station reservation lands.

3. The determination of the quantum of damages, if any, beyond fair market value of the plaintiff's interests in the station reservation lands as of June 30, 1909, necessary to provide ". . . an appropriate and equitable measure of redress under clause 5" (*see Seminole Nation v. United States,* 203 Ct. Cl. 637, 654 n. 11 (1974)), shall be made by the Commission as part of its decisions in the valuation phase of this docket.

IT IS FURTHER ORDERED that this case proceed to determinations with respect to each station reservation which had been owned by plaintiff and which on June 30, 1909, was situated within a municipality as defined *supra*, of the fair market value on said date of the station reservation lands, the fair market value on said date of the plaintiff's interests in said lands, and the fair market value on said date of any encumbrances upon said lands in the form of easements for right-of-way purposes, and

IT IS FINALLY ORDERED that the attached communication, dated February 27, 1909, consisting of two pages and addressed to the Secretary of the Interior from the Acting Commissioner of Indian Affairs, which communication was filed on February 14, 1975, as plaintiff's proposed Exhibit No. 32 in Commission Docket 277, *Creek Nation v. United States*, involving identical issues of law, be, and the same hereby is, admitted into evidence in this docket as Commission Exhibit No. 1.

Dated at Washington, D. C., this 17th day of March 1976.

/s/ Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

/s/ John T. Vance,
John T. Vance, Commissioner

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/ Brantley Blue
Brantley Blue, Commissioner

APPENDIX K

Extracts from testimony of Samuel L. Stokes, real estate appraiser, the expert witness for petitioner, plaintiff below, on the value of the surface of the 142 tracts involved herein:

Hearing June 26, 1975, before Indian Claims Commission:

Vol. 1, pp. 32-33: "THE WITNESS: Well, I had expected to find sales in the marketplace or in the records which would – which I would be able to verify that would give a market value of the land as of that time because I have not, not having lived in the 1907 era, I hadn't had experience working with 1907 land values prior to this particular assignment other than to be basically familiar with the Oklahoma history and how the values have run.

"* * * In the research of records, almost without fail, reported sales of one dollar and other valuable consideration, or I would have been forced to use those sales or – not sales but this set values that were set by Government figures.

"COMMISSIONER BLUE: Are these the ones you said in your opinion they were given on the written record without seeing the site?

"THE WITNESS: Yes, sir, these were values that were assigned based on these engineers' observations to –

"COMMISSIONER BLUE: To somebody some distance away?

"THE WITNESS: Yes, probably in Washington or some place or perhaps even in the Muskogee area office or the Dawes Commissioner, whatever.

"COMMISSIONER BLUE: How did you arrive at your surface basis?

"THE WITNESS: These values were arrived at by studying the soils and the climate and I have been working in that immediate area since 1963. For five years I worked with the Bureau of Indian Affairs, and I have examined thousands and thousands of sales throughout that area, not only just in the Creek area, but in other areas, and I am familiar with the values."

* * * *

"COMMISSIONER BLUE: How did you arrive at 1907 value?

"THE WITNESS: This was based on the climate of the area being in a temperate zone, the type soils and what those soils now bring and what they would bring if they were placed in the market at that time, based on my knowledge of trends and how the studies of economics are throughout that area –

* * * *

Vol. I, pp. 81-82:

"MR. CLUBB: Is this still Muskogee County you are talking about?

"MR. NIEBELL: Yes.

"BY MR. NIEBELL:

"Q. Let me ask you this: Would these prices generally prevail over the nine-county area involved in this case?

"A. Pretty much the same for soils of similar capabilities and abilities, if managed in certain ways, the values would be pretty well consistent. This is a relatively small area and if the values in Muskogee County were thus, then Muskogee County adjoins MacIntosh County, Okmulgee County and Wagoner County, and the values would be very minimally differentiated, if at all."

* * * *

Vol. I, pp. 79-81:

"Q. Now, will you turn to the Exhibit, Muskogee Soil survey Report, Claimant's Exhibit No. 17 in the record. Did you review this soil survey in making your appraisal?

"A. Yes, sir, I did.

"Q. Now, will you explain the prices that are set forth in this survey report with respect to the several species of soil series that are mentioned there?

"A. Well, first, the soil is described by these people who inspected it and described what the land was and its capability, what crops would grow on it and the various other information, and the value statement as to the value of that particular series or group of series of soils ranging from – now, this is in 1913 when this

was originally made – that the value of sandy mountain soils ranged from $8 to $20 an acre; and from $40 to $100 an acre for prairie land; and from $100 to $125 or more for first and second bottom lands; and then as you go through the report there are statements as to the value throughout the commentary on each individual named soil.

"MR. CLUBB: These are values of 1913 you are talking about?

"THE WITNESS: Yes, sir.

"MR. CLUBB: Not 1907?

"THE WITNESS: Well, it would be six years remote from that, but not a lot different in those days from what they would have been in 1907 because of the activity that was generated there. It was a tremendous growth in Muskogee in the years surrounding 1907.

* * * *

"BY MR. NIEBELL:

"Q. Mr. Stokes, let me ask you, was there very much difference between the values in 1913 and 1907, in your opinion?

"A. No, sir, not very much."

* * * *

Vol. I, pp. 88-89:

"MR. NIEBELL: I might point out that we have a soil survey of Tulsa County which is in the record, your honor.

"THE WITNESS: Also, we have a survey of Creek County with the aerial photographs.

"MR. NIEBELL: That's right. With respect to climate, rainfall, and the like, would those show up in the soil surveys?

"THE WITNESS: Yes, sir, it's in every one of them.

"BY MR. NIEBELL:

"Q. And the temperature?

"A. Yes.

"Q. And let me ask you this: Is the rainfall and the temperature of Muskogee County and Wagoner County pretty much the same?

"A. Well, frankly, the climate and the rainfall and the soils of Muskogee, Wagoner County, southern Tulsa County, Okmulgee County, and the big majority of McIntosh County and Okfuskee County and the big majority of Creek County are highly comparable to the soils in Muskogee County.

"And development of the various towns on the western side of the Creek Nation was very comparable to the development of Muskogee. Muskogee was kind of the hub of a number of railroads. In 1906 there were five different railroads headquartered in Muskogee.

"Cotton grown throughout that area, all through this collective area, was shipped all over the world and even quoted separately on the

London Exchange from all other cotton as being a special breed of cotton, and this was in 1906 prior to the date of statehood and prior to this report, and it was a considerable amount of cotton raised all through that area and up and down the Arkansas River."

* * * *

APPENDIX L

Extract from Cl. Ex. 17

U. S. Department of Agriculture
Issued August 4, 1915
Bureau of Soils – Milton Whitney, Chief

Soil Survey of Muskogee County, Oklahoma
by
Grove B. Jones, Cornelius Van Duyne,
Ewing Scott, and H. W. Hawker.

Hugh H. Bennett, Inspector, Southern Division.

[Advance Sheets -
Field Operations of the Bureau of Soils, 1913.]

Washington: Government Printing Office, 1915

[Printed pursuant to Public Resolution No. 9]
Approved March 14, 1904, 33 Stat. 583

p. 43:

"The value of farm lands ranges from $8 to $20 an acre for the sandy mountain soils, from $40 to $100 for prairie land, and from $100 to $125 or more for the first and second bottom lands."

APPENDIX M

Summary of tracts having a potential value for townsites, and values of said tracts as determined by Samuel L. Stokes, petitioner's appraiser, as shown in the Stokes' appraisal report, Claimant's Exhibit 22:

Tract 13 A-B, Creek Co., Town of Depew	160 acres	$16,000.00
Tract 1, Tulsa Co., Town of Broken Arrow	160 "	24,000.00
Tracts 3, 4, 5, 6, Tulsa Co., Industrial Town of Sand Springs	640 "	1,146,000.00
Total		$1,186,000.00

Extract from Defendant's Exhibit V-12, Oil Investors' Journal, March 5, 1907, issue, p. 2:

> "Eight strings of tools will be working on the Producers Oil Company's 100 acres in section 8 when all the material arrives. John Black, who is directing the operations of this company in the Glenn field, is one of those who believe that it will be a case of 'first come, first served,' and he is going after the oil with a vengeance. Others who have paid at the rate of $1,500 an acre for Glenn field leases are moving in the same way."

Extract from Claimant's Exhibit 9, Report of R. C. Allen, National Attorney for Creek Nation, to The Secretary of the Interior, dated May 9, 1916:

> "From time to time your attention has been called to a large number of alleged fraudulent and duplicate allotment cases pending in the

> **Creek Nation in connection with which investigations will have to be made before these cases are disposed of finally.**
>
> * * * *
>
> **"In addition to the above there are a large number of other duplicate and fraudulent cases now ready to be filed and approximately 75 other cases are being investigated by my office with a view of requesting that suit be brought if the facts are found to justify. * * *"**
>
> "The case of *U. S. vs. Bessie Wildcat, et al.*, which was brought to cancel the allotment certificate and patent issued to and in the name of Barney Thlocco, was decided against the Government and is now pending in the Circuit Court of Appeals and will be argued in that Court at St. Paul, Minnesota, on May 16, 1916.
>
> "The Trial Court held that the action of the Dawes Commission in enrolling and allotting Barney Thlocco was final and did not permit us to go into the evidence bearing upon the question of whether he was living on April 1, 1899. We confidently expect a reversal of this case and, pending the final decision, we should continue our investigation as to the date of the death of this allottee. Such investigations are being made by the defendants at this time.
>
> *"The Thlocco allotment is worth approximately $2,000,000 and by reason of its great value it seems to me that we would be amply justified in incurring the expense of detailing some competent person to continue this investigation.

* * * *

"Each of the three allotments to which your attention has been specifically called are worth upward of a million dollars. Practically the same necessity exists for a thorough investigation into the facts of each of the other cases as exists with reference to the cases above mentioned."

Addenda:

"* * * The allotment of Jemima also lies in the Cushing Oil Field. There are now a number of large producing wells on the property and in my judgment it is easily worth more than $1,000,000 and should not be surrendered to any one citizen of the Creek Nation to the detriment, as such an act would be, of all the other citizens of the Tribe."

*The Barney Thlocco allotment of 160 acres is one of the tracts involved in this case, Case No. 47, Cl. Ex. 23, summary page xii, which shows the one-eighth royalty on the 3,013,545 barrels of oil produced therefrom during the years 1914-1967, totaled $573,899.44.

Extracts from summary sheet, p. xv, Cl. Ex. 23, the Minerals Appraisal Report of Dr. Josef Faust and John J. Hassler, expert witnesses of plaintiff on mineral values of the 142 tracts in question:

"NOTE: 75 allotments produced. Production records available on 63."

"25,871,095 'barrels of oil produced from the 63 tracts; and the one-eighth royalty on the barrels produced totaled' $6,284,578.61".

"RECAP

"I.	Total 'Lease Bonus and Rental' Value	$ 227,360.19
"II.	Oil and Gas Value:	
	A. Royalty Value	342,762.00
	B. Production Value	6,284,578.61
"III.	Coal Value	170,678.42
	"Total 'True' Value	$7,025,379.22"

Extracts from text of the Faust and Hassler Minerals Appraisal Report, Claimant's Exhibit 23, pp. 36-37:

"The difficulty in locating the actual barrels produced from 1900 to 1935 from 'old' properties is easily recognized. No organized production was known in the early years. Therefore, poor records and the sale or merger of these early properties and companies into other or larger corporations make it impossible to get accurately these early producing figures."

* * * *

"We have made this intensive, time consuming, and exhaustive research because we firmly believe

and, therefore, assume that the actual number of barrels, as well as cubic feet of gas, produced from any given tract of land represents *its true value* insofar as oil and gas is concerned, regardless of the time it was or is produced."

Summary of three of the 63 oil producing tracts located in the Glenn Oil Field, Creek County, Oklahoma, as set forth in Claimant's Exhibit 23, the Minerals Report of Faust and Hassler, plaintiff's mineral experts:

No. 61 Judie Barnett – 154.25 acres, SW¼ Sec. 13, T. 18 N., R. 11 E., Creek County, Oklahoma, one-eighth royalty on oil produced therefrom during years 1909 through 1974, under oil and gas leases 1908 and 1928, totaled $380,741.11
(Cl. Ex. 23, pp. 235-237);

No. 62 Sampson McGilbray – 160 acres, Secs. 28-29, T. 18 N., R. 12 E., Creek County, Oklahoma, one-eight royalty on oil produced therefrom during years 1921-1974, under oil and gas lease 1908, totaled $253,893.10
(Cl. Ex. 23, pp. 241-243)

No. 63 Dora Ellen Parks – 160 acres, NW¼ Sec. 33, T. 18 N., R. 12 E., Creek County, Oklahoma, one-eighth royalty on oil produced therefrom during years 1921 through 1974, under oil and gas leases 1908 and 1918, totaled $107,785.22
(Cl. Ex. 23, pp. 245-247)

Supreme Court, U. S.
FILED
AUG 30 1978
MICHAEL RODAK, JR., CLERK

No. 78-15

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE CREEK NATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

JAMES E. CLUBB,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-15

THE CREEK NATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Claims (Pet. App. C) is not yet reported. The valuation opinion of the Indian Claims Commission (Pet. App. D) is reported at 39 Ind. Cl. Comm. 383.

JURISDICTION

The order of the Court of Claims was entered on April 4, 1978. The petition for a writ of certiorari was filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Indian Claims Commission abused its discretion in measuring petitioner's damages by the fair market value of the land petitioner lost as a result of the government's failure to deal fairly and honorably.

2. Whether the Indian Claims Commission's damage award was supported by substantial evidence.

STATUTE INVOLVED

Sections 2 and 20(b), (c) of the Indian Claims Commission Act, 60 Stat. 1050, 1054, 25 U.S.C. 70a and 70s(b), (c), are reprinted in Pet. App. G.

STATEMENT

Petitioner brought this action before the Indian Claims Commission pursuant to Section 2(5) of the Indian Claims Commission Act, 25 U.S.C. 70a(5), which authorizes the Commission to hear claims against the United States by American Indians "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Petitioner sought to recover the value of Creek Nation lands that the government had erroneously allotted in 1907 to persons who were not members of the Creek Nation (see Pet. App. 1a-12a). In an order issued December 14, 1970, the Commission held that the United States had violated its obligation to act fairly and honorably toward petitioner by refusing to give petitioner copies of the government-approved rolls of Creek citizens and by failing to take reasonable precautions to prevent erroneous enrollments (Pet. App. 79a-111a). Accordingly, the Commission ordered that the case proceed to a determination of the damages, if any, suffered by petitioner as a result of the government's breach of its obligations.

In the damages trial, the parties stipulated that 142 allotments, representing 212 separate tracts totalling 22,737.21 acres, had been made to persons erroneously enrolled as members of the Creek Nation (Pet. App. 27a-28a). The Commission concluded that the proper measure of the damages to petitioner was the fair market value of these tracts as of March 4, 1907, the date the Creek Nation rolls on which the allotments were based became final (Pet. App. 30a-33a).[1] Applying this standard, the Commission found that the aggregate value of the land for surface uses was $430,324.65, an average of $18.92 per acre (Pet. App. 38a). In addition, the Commission found that the value of the lands was enhanced by the possibility that they included deposits of minerals known in 1907 to be present in this geographic area. It added an increment of $110,000 for known and potential coal deposits on the lands, and an increment of $550,000 for known and potential oil and gas deposits (Pet. App. 38a-50a). The Commission thus held that petitioner was entitled to total damages of $1,115,706.20 (Pet. App. 50a).

On appeal, the Court of Claims affirmed, holding that the Commission had not abused its discretion in determining the measure of damages and that its award was supported by substantial evidence on the record as a whole (Pet. App. 22a-26a).

ARGUMENT

1. Petitioner contends (Pet. 10-15) that the Commission erred in measuring its damages by the fair market value of the erroneously allotted lands at the date the Creek Nation rolls became final. Petitioner urges that it was also entitled to compensation for the loss of the royalties that were actually paid on the oil and gas produced from these lands in subsequent years.[2]

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[1] Additionally, in some cases the enrollees were paid small sums of "equalization money" if the estimated value of the land allotted to them was less than $1,040.00; the Commission found the government liable for $25,381.55 it paid to persons erroneously enrolled (Pet. App. 33a). That award is not at issue here.

[2] No issue is raised regarding the Commission's determination that the value of petitioner's lands was enhanced by $110,000 because of the possible presence of coal (Pet. 6 n. *).

This contention is without merit. The traditional measure of damages in both federal eminent domain proceedings and Indian claims cases is the fair market value of the property at the date the claimant lost title. *E.g., Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474; *Pillager Bands of Chippewa Indians* v. *United States*, 428 F. 2d 1274, 1276 (Ct. Cl.); *Nooksack Tribe* v. *United States*, 162 Ct. Cl. 712, 718, certiorari denied, 375 U.S. 993.

Petitioner contends (Pet. 10-12) that under *Seminole Nation* v. *United States*, 492 F. 2d 811 (Ct. Cl.), the Commission is also required to award damages for lost income when there has been a breach of the government's duty of fair and honorable dealings. But, as the Court of Claims pointed out (Pet. App. 23a-24a), its decision in *Seminole Nation* did not reject the fair market value measure or require the Commission to employ any particular measure in determining damages. The court there stated (492 F. 2d at 821):

> The United States is properly liable, under the fair and honorable dealings clause, for the monetary damage suffered by appellant through this statute. *We leave to the Commission on remand to determine the appropriate compensation—whether it should be fair value as of the date of vesting in the towns and cities, the rents and profits derived from the lands, a combination of both standards, or some other measure.* [Emphasis added; footnote omitted.][3]

[3]Petitioner urges (Pet. 12-13) that the Commission awarded damages including lost income in *Makah Tribe* v. *United States*, 40 Ind. Cl. Comm. 131. However, as the Court of Claims observed (Pet. App. 24a), in *Makah* the government's breach of its duty of fair and honorable dealings did not involve a loss of land, but rather breach of the government's promises to aid the Tribe in fishing and maritime activities. As the court concluded (*ibid.*), the Commission's failure to follow *Makah* in this case, where the government's conduct resulted in the loss of title to land, was not an abuse of discretion. Similarly, petitioner's argument (Pet. 14-15) that under general trust law a beneficiary can recover lost income for a breach of fiduciary duties does not establish that the Commission abused its discretion by failing to apply an analogous rule to the facts of this case.

2. Petitioner also contends (Pet. 9, 16-21) that the Commission's findings are not supported by the record.[4] Petitioner urges that the Commission ignored the soil surveys prepared by the Department of Agriculture and the testimony of petitioner's appraiser (Pet. 16-18), and that the Commission's reliance on evidence of actual sales of Creek Nation lands was erroneous because those sales were based on improperly low appraisals (Pet. 20). Additionally, petitioner argues (Pet. 20) that the Commission failed to take account of cash bonuses paid for leasing rights on similar lands.

As the Court of Claims correctly recognized (Pet. App. 25a), even if the record includes evidence that might justify a higher award, the Commission's determination must be affirmed as long as it is supported by substantial evidence on the record as a whole. *Iowa Tribe of Iowa*

[4]Petitioner states that the Commission made inconsistent findings that the land would not have been allotted it it were known to contain minerals, and that federal officials knew there was oil on the Creek Nation land (Pet. 19-20). This argument is frivolous. The Commission observed (Pet. App. 53a, 29a) that no effort was made to appraise the mineral values of the land at the time of allotment because "the land would not have been allotted had it been known that there were minerals beneath the surface," inasmuch as "[i]t was, *in theory*, the policy of the Department of the Interior to hold mineral lands for the benefit of all members of the tribe" (emphasis added). This explanation of why the commission charged with appraising the lands failed to appraise their mineral value is in no way inconsistent with the Commission's finding (Pet. App. 62a)—with which petitioner agrees—that at the time of the allotments it was known the some Creek Nation lands overlay mineral deposits.

Reservation v. *United States*, 195 Ct. Cl. 365, 368-369, certiorari denied, 404 U.S. 1017; *Sac & Fox Tribe of Indians of Oklahoma* v. *United States*, 315 F. 2d 896, 906 (Ct. Cl.), certiorari denied, 375 U.S. 921.

The record contains ample support for the Commission's finding of the fair market value of the land. The Commission relied on evidence of 30 actual sales of Creek Nation tracts between 1906 and 1907, at an average price of $18.42 per acre; on 39 contemporaneous appraisals by the United States Indian Agent at Muskogee, which averaged $13.67 per acre; and on 50 appraisals and sales during 1906, at an average appraisal of $15.52 per acre and an average sale price of $18.58 per acre (Pet. App. 35a-36a). The Commission also relied on the 1910 Federal Census appraisal of $23.00 per acre for farm land in the counties where the tracts in question were located (*ibid.*). Finally, the government's appraiser testified that the fair market value in 1907 was $21.95 per acre (Pet. App. 36a-37a). Accordingly, although petitioner presented some evidence that would have supported a higher award, the Commission's determination of the surface value of the lands was supported by substantial evidence on the record as a whole.

The evidence of the enhancement due to the possible mineral deposits was also conflicting, but the record contains substantial evidence supporting the Commission's award. There was evidence that the average value of oil leases at the date of valuation was $25.00 per acre, and the Commission concluded (Pet. App. 49a-50a) that this evidence provided the "most reliable basis" for determining the value of the possible mineral deposits. The Commission reasonably determined that bonuses for oil leases were not paid with enough regularity to be a significant factor in determining the value of the lands (Pet. App. 49a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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